

(24,358)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1915.

No. 239.

ALBERT STEINFELD, R. K. SHELTON, J. N. CURTIS,
SILVER BELL COPPER COMPANY, AND MAMMOTH
COPPER COMPANY, APPELLANTS,

vs.

LOUIS ZECKENDORF AND HIRAM W. FENNER, RECEIVER.

APPEAL FROM THE SUPREME COURT OF THE STATE OF ARIZONA.

INDEX.

	Original.	Print
Caption	a	1
Transcript of record from the superior court in and for Pima county	1	2
Mandate from State supreme court.....	2	2
Motion for order fixing amount of bond of receiver and requiring receiver to proceed as ordered in judgment....	11	6
Affidavit for change of venue.....	13	7
Objections of plaintiff to change of venue.....	14	7
Affidavit of F. H. Hereford in opposition to change of venue	15	8
Amended motion for judgment.....	16	9
Exceptions of defendant to motion for judgment.....	36	16
Exhibit 133—Agreement between Silver Bell Copper Co. and Steinfeld, May 20, 1903.....	47	21
Testimony of E. S. Ives.....	143	62
Deposition of Jesse W. Lillenthal.....	160	69
Testimony of Albert Steinfeld.....	170	72
J. N. Curtis.....	175	75
Louis Zeckendorf.....	179	77
Complaint	181	78
Amount of judgment.....	215	92

	Original.	Print
Additional exceptions by defendant.....	222	95
Judgment	223	96
Motion to set aside judgment.....	236	101
Motion for new trial.....	243	103
Motion to modify judgment.....	250	106
Motion to modify judgment and discharge receiver.....	252	107
Affidavit of Gerald Jones.....	253	107
R. K. Shelton.....	254	108
J. N. Curtis.....	254	108
Gerald Jones (further).....	255	108
J. N. Curtis (further).....	257	109
Additional exceptions and objections to motion for judgment	258	109
Reporter's transcript of proceedings.....	268 $\frac{1}{2}$	114
Decision on motion for judgment.....	269	114
Oral proceedings and colloquy between court and counsel	271	115
Order fixing bond of receiver.....	282	120
Order denying motion to modify judgment.....	361	155
Order denying motion to set aside judgment.....	361	5
Order denying motion in arrest of judgment.....	361	155
Order denying motion to modify judgment and discharge receiver.....	363	155
Reporter's certificate to transcript of oral proceedings	371	159
Judge's certificate to transcript of proceedings.....	371	159
Affidavit of Albert Steinfeld.....	372	159
Minute entries.....	373	160
Motion and order appointing Hon. Fred Sutter judge in the case.....	373	160
Stipulation as to filing briefs, certain motions, etc....	375	161
Order as to costs incurred by Sutter, J.....	376	161
Order granting motion for judgment and directing judgment for plaintiff, fixing receiver's bond, etc....	377	161
Order directing presentation of form of judgment by counsel, etc.....	378	162
Order as to costs incurred by Sutter, J.....	380	163
Order as to hearing on form of judgment, etc.....	380	163
Orders on motions, signing and filing judgment, and grant stay of sixty days, etc.....	381	163
Order granting petition of receiver for leave to employ counsel, etc.....	383	164
Order as to costs incurred by Sutter, J.....	385	165
Judgment and notice of appeal therefrom.....	385	165
Judgment and notice of appeal therefrom.....	391	167
Orders continuing the matter of sufficiency of sureties on bond.....	393	168
Clerk's certificate to minute entries and record.....	395	169
Order granting motion to substitute receiver.....	396	170
Assignment of errors on appeal from superior court of Pima county	397	170

INDEX.

iii

Original. Print

Order granting appellants additional time to file brief.....	429	184
Opinion, Ross, J.....	430	185
Judgment of supreme court and order granting motion to dismiss	441	190
Order denying motion to recall order of dismissal.....	443	190
Petition for rehearing.....	443	191
Order overruling objections to cost bills.....	445	191
Order denying motion for rehearing.....	445	192
Application for and allowance of appeal.....	446	192
Order allowing appeal.....	447	192
Order fixing amount of supersedeas bond.....	448	193
Order for return of record from superior court.....	448	193
Supersedeas bond.....	448	193
Assignment of errors.....	453	195
Proceedings in the district court of the first judicial district of the Territory of Arizona in and for the county of Pima on first appeal.....	477	206
Findings of fact by trial court upon first trial.....	477	206
Judgment of trial court upon first trial.....	505	218
Assignment of errors on appeal from district court upon first trial.....	510	220
Opening paragraph of supplemental brief of appellants on first appeal.....	523	226
Opinion supreme court of the Territory of Arizona on first appeal, Sloan, J.....	524	227
Dissenting opinion, Nave, J.....	542	235
Judgment of supreme court of Territory of Arizona on first appeal	547	238
Opinion of supreme court of Territory on first appeal on re- hearing, Nave, J.....	549	239
Judgment of supreme court of Territory on first appeal on re- hearing	552	240
Transcript of record from the first judicial district court in and for the county of Pima.....	553	240
Third amended complaint.....	553	240
Schedule Exhibit A—List of properties sold by the Silver Bell Copper Co. to Imperial Copper Co., on May 20, 1903.	633	269
Answer to third amended complaint.....	635	270
Exhibit B—Agreement between Silver Bell Copper Co. and Mammoth Copper Co., May 20, 1903.....	712	297
Stipulation as to affirmative allegations in defendants' answer	715	298
Minute entry of district court, January 6, 1908, as to trial, evidence, and record on trial, etc.....	717	299
Findings of fact by trial court upon second trial.....	718	300
Judgment of trial court on second trial.....	838	344
Assignment of errors on appeal from district court upon second trial.....	844	346
Assignment of errors of defendants-appellants on appeal from district court upon second trial on second cause of action	850	349

Opinion of supreme court of the Territory of Arizona upon second appeal, Sloan, J.....	861	355
Judgment of supreme court of the Territory of Arizona upon second appeal.....	889	367
Findings of facts by supreme court of the Territory of Arizona on second appeal.....	890	368
Mandate of Supreme Court of the United States.....	1013	413
Order denying motion to amend record.....	1016	415
Order denying motion to consider and determine findings of fact in the nature of a special verdict.....	1017	415
Order disallowing stenographer's charge for transcribing record on first appeal.....	1017	415
Order striking certain items from the cost bill.....	1017	415
Order fixing costs to be taxed in remittitur to superior court..	1018	416
Rule 12 of the supreme court of the State of Arizona.....	1018	416
Præcipe of appellants for record.....	1020	416
Objections to præcipe.....	1025	419
Motion for judgment and decree, filed in superior court February 6, 1913.....	1028	421
Motion of appellee to dismiss appeal.....	1046	429
Motion to substitute receiver of Silver Bell Copper Co.....	1055	433
Motion of receiver for leave to dismiss appeal of Silver Bell Copper Co.....	1066	439
Letter from E. S. Ives to clerk, November 24, 1913.....	1071	441
Letter from Frank H. Hereford to clerk, November 26, 1913....	1072	442
Notice of defective abstract of record.....	1074	443
Submission of case by Hiram W. Fenner, receiver.....	1076	443
Reply of receiver to appellants' motion to set aside judgment and leave to file additional abstract of record.....	1077	444
Præcipe of appellee for record.....	1080	445
Clerk's certificate.....	1082	447
Citation and service.....	1083	448
Certificate of clerk that extra time is required to prepare transcript of record.....	1086	449
Order enlarging time for filing and docketing transcript of record	1088	449

a In the Supreme Court of the State of Arizona.

No. 1347.

ALBERT STEINFELD, R. K. SHELTON, J. N. CURTIS, HIRAM W. FENNER, Receiver for Silver Bell Copper Company, a Corporation; Mammoth Copper Company, a Corporation, Appellants,

VS.

LOUIS ZECKENDORF, Appellee.

Mr. Samuel L. Kingan, Mr. Francis J. Heney, and Mr. Eugene S. Ives, attorneys for Appellants.

Mr. Selim M. Franklin, attorney for Hiram W. Fenner, Receiver for Silver Bell Copper Company.

Mr. Frank H. Hereford, and Mr. Edwin A. Meserve attorneys for Appellee.

On Appeal from the Superior Court of the State of Arizona, in and for Pima County.

Be it remembered, that on to-wit: the twenty-fifth day of September, 1913, came the appellants in the above entitled cause, by their attorneys, and filed in the office of the clerk of the Supreme Court of the State of Arizona in above entitled cause, the record on appeal from the Superior Court of Pima County, State of Arizona, in words and figures following, to-wit:

1 In the Supreme Court of the State of Arizona.

No. 1347.

LOUIS ZECKENDORF, Plaintiff-Appellee.

vs.

ALBERT STEINFELD, R. K. SHELTON, J. N. CURTIS, SILVER BELL
Copper Company, a Corporation; Mammoth Copper Company,
a Corporation, Defendants-Appellants.

In the Superior Court of the State of Arizona in and for the County
of Pima.

No. 3496.

LOUIS ZECKENDORF, Plaintiff,

vs.

ALBERT STEINFELD, R. K. SHELTON, J. N. CURTIS, SILVER BELL
Copper Company, a Corporation; Mammoth Copper Company, a
Corporation, Defendants.

2 (*Mandate of Supreme Court of the State of Arizona.*)

In the Supreme Court of the State of Arizona.

To the Honorable the Superior Court of the State of Arizona in
and for the County of Pima, Greeting:

[SEAL.]

Whereas, lately in the District Court of the Territory of Arizona
in and for the County of Pima, before you in a cause between Louis
Zeckendorf, plaintiff, and Albert Steinfeld, R. K. Shelton, Silver
Bell Copper Company, a corporation, and Mammoth Copper Com-
pany, a corporation, defendants, No. 3483, wherein the judgment
of the said District Court entered in said cause on the 30th day of
July, A. D. 1908, is in the following words, viz:

"This cause came on regularly for trial before the Court, Hon-
orable John H. Campbell, Judge thereof, presiding, sitting without
a jury (a jury having been theretofore regularly waived by all
parties) on the 2nd day of January, 1908, all parties being present
in person, and also by their attorneys; evidence oral and docu-
mentary having been regularly introduced and offered by the re-
spective parties and received by the Court, the cause was in regular
order and in due course and form argued to the Court, and
submitted to it for its decision; after due consideration of
the pleadings and of all admitted evidence in the case, and
being fully advised in the premises, wherefore by virtue of the law
and the premises aforesaid, it is hereby ordered, adjudged and de-
creed:

First. That the plaintiff recover nothing upon the first cause of

action in the complaint set forth, and as to the said first cause of action the defendants go hence without day.

Second. That Albert Steinfeld upon the second cause of action in said complaint set forth, pay to the defendant the Silver Bell Copper Company, and that the said Silver Bell Copper Company do have and recover from said Albert Steinfeld, the sum of \$20,850.00 with interest thereon at the rate of six per cent per annum from the 20th day of January, 1904; that plaintiff do have execution for the said sum of \$20,850.00 and interest thereon from said date against the said Albert Steinfeld, the recoveries on said execution to be paid to the defendant, the Silver Bell Copper Company or to the receiver of said company to be appointed as in this judgment provided.

Third. That L. Zeckendorf, plaintiff in the above entitled action, do have and recover of and from Albert Steinfeld his plaintiff's costs in this action herein taxed at the sum of \$632.60 and that plaintiff do have execution in his favor and against said defendant therefor.

Fourth. That plaintiff, out of the said money recovered and to be recovered by said Silver Bell Copper Company from the said Albert Steinfeld, do have and recover of and from the said Silver Bell Copper Company, and be paid by the said Silver Bell Copper Company the sum of \$2,652.50 as and for attorneys' fees for the bringing of this action and the prosecution of the same up to and including the entry of this judgment; and it is further ordered that the receiver hereafter to be appointed herein and hereafter named, do pay to said plaintiff the said sum of \$2,652.50 out of the said moneys to be recovered by said Silver Bell Copper Company from the said Albert Steinfeld.

It is further ordered, adjudged and decreed and the Court does hereby order that Hiram W. Fenner be, and he is, hereby appointed receiver of all property, money, book- and assets of any kind or character of or belonging to the said Silver Bell Copper Company and any person or persons having any money or assets belonging to the said Silver Bell Copper Company are hereby ordered to turn over and deliver the same to the said receiver, the same to be held by the said receiver and retained and kept in possession, and to be distributed, paid out and disbursed upon the orders of this court to be made from time to time in this action; said receiver to execute the usual oath of office and to give and execute a bond in the sum of \$— in the usual form of receiver's bond, to be approved by this Court, for the faithful performance by him of his duties, as receiver; and the said Hiram W. Fenner as such receiver immediately upon the filing of his oath and the approval of his bond, as aforesaid, is hereby ordered and directed to take immediate possession of all the moneys, property and other assets of the said Silver Bell Copper Company, and to hold and disburse the same in accordance with the orders and judgment herein contained and in accordance with the orders to be made by this Court from time to time hereafter.

It is further ordered, adjudged and decreed that upon the final

termination of this action, the said Silver Bell Copper Company shall be dissolved, and that thereupon all its debts and liabilities shall then be paid and discharged and thereupon all property, money and assets of such corporation then remaining shall be distributed among its stockholders in the proportions of their several ownership of stock.

6 The said dissolution, payments, disbursements and distributions to be done and accomplished by orders of this court for that purpose in this action made and to be made.

It is further ordered, adjudged and decreed that Albert Steinfeld holds the sum of \$25,750.00 money of said Silver Bell Copper Company, in his hands as and for security to him against any liability on account of the garnishment levied on him in the action of Franklin vs. Silver Bell Copper Company, said Steinfeld to account to said corporation or to the receiver of said corporation hereafter appointed for said sum immediately upon the final determination and settlement of this action, and to pay the said Silver Bell Copper Company or to such receiver the balance of said sum, if any, after deducting therefrom such sums, if any, that said Steinfeld may properly and in accordance with law pay or have paid for the benefit of the said Silver Bell Copper Company.

Done in open court this 30th day of July, 1908.

JOHN H. CAMPBELL, *Judge*.

Filed October 4, 1908.

as by the inspection of the record of the said District Court which was brought into the Supreme Court of the Territory by virtue of an appeal taken by Louis Zeckendorf, and a cross appeal taken by

7 Albert Steinfeld, R. K. Shelton, Silver Bell Copper Company a corporation, and Mammoth Copper Company, a corporation, agreeably to the law in such case made and provided fully and at large appears.

And whereas, in January term, in the year of our Lord 1909 said cause came to be heard before said Supreme Court on the said record and was argued by counsel;

On consideration whereof, it was on the 20th day of March in the year of our Lord 1909 ordered that the judgment of the District Court herein appealed from, be, and the same is hereby affirmed.

It was further ordered, adjudged and decreed that the Silver Bell Copper Company, a corporation, do have and recover of and from Albert Steinfeld, one of the appellants herein, and Epes Randolph and Leo Goldschmidt, sureties on the supersedeas bond herein, the amount of the judgment rendered in the trial court in favor of the defendant, the Silver Bell Copper Company.

It was further ordered, adjudged and decreed that Louis Zeckendorf do have and recover of and from Albert Steinfeld, one of the appellants herein, and Hugo J. Donau and L. Rosenstern, sureties on the cost bond herein, his costs in the court below in this case incurred.

8 And whereas, an appeal was thereafter taken by Louis Zeckendorf and a cross appeal taken by Albert Steinfeld,

J. N. Curtis, R. K. Shelton and Silver Bell Copper Company to the Supreme Court of the United States in this cause; and

Whereas, said Supreme Court of the United States did on the 7th day of June, 1912, render its judgment in said cause, and a mandate from said Supreme Court of the United States having been filed in the office of the Clerk of this Court on the 23d day of November, 1912, and there remains of record, and is in the following words, viz:

UNITED STATES OF AMERICA, ss:

[SEAL.]

The President of the United States of America to the Honorable the Judges of the Supreme Court of the State of Arizona, Greeting:

Whereas, lately in the Supreme Court of the Territory of Arizona in a cause between Louis Zeckendorf, appellant, and Albert Steinfeld, et al., appellees, No. 1101, on appeal and cross appeal wherein the decree of the said Supreme Court entered in said cause on the 20th day of March, A. D. 1909, is in the following words, viz:

"This cause having been heretofore submitted and by the court taken under advisement, and the court having considered the same, and being fully advised in the premises;

"It is ordered, adjudged and decreed that the judgment of the District Court herein appealed from, be, and the same is hereby affirmed:

"It is further ordered, adjudged and decreed that the Silver Bell Copper Company, a corporation, do have and recover of and from Albert Steinfeld, one of the appellants, herein and Epes Randolph and Leo Goldschmidt, sureties, on the supersedeas bond herein the amount of the judgment rendered in the trial court in favor of the defendant, Silver Bell Copper Company.

"It is further ordered, adjudged and decreed that Louis Zeckendorf do have and recover of and from Albert Steinfeld, one of the appellants herein, and Hugo J. Donau and L. Rosenstern sureties on the cost bond herein, his costs in the court below in this cause incurred;"

as by inspection of the transcript of the record of the said supreme court which was brought into the Supreme Court of the United States by virtue of an appeal taken by Louis Zeckendorf and a cross appeal taken by Albert Steinfeld, J. N. Curtis, R. K. Shelton and Silver Bell Copper Company agreeably to the Act of Congress in such case made and provided fully and at large appears.

And whereas, in the present term of October in the year of our Lord, 1911, the said cause came on to be heard before the said Supreme Court on the said transcript of record on appeal and cross appeal and was argued by counsel:

On consideration whereof it is now here ordered and adjudged by this court that the judgment of the said Supreme Court in this cause insofar as it affirms the judgment of the District Court on the

first cause of action be, and the same is hereby reversed; and insofar as it affirms the judgment of the said District Court on the second cause of action, be and the same is hereby affirmed, costs in this court to be paid by Steinfeld, et al., and that the said Louis Zeckendorf recover against the said Albert Steinfeld et al. \$531.37 for his costs herein expended and have execution therefor.

And it is further ordered that this cause be and the same is hereby remanded to the Supreme Court of the State of Arizona for such further proceedings as may not be inconsistent with the opinion of this court, June 7, 1912.

You therefore are hereby commanded that such execution and further proceedings be had in said cause in conformity with the opinion and judgment of this court as according to right and justice and the laws of the United States ought to be had the said appeals notwithstanding.

11 Witness the Honorable Edward White, Chief Justice of the United States.

Twelfth day of November, in the year of our Lord, 1912.
(Enumeration of costs.)

JAS. H. McKENNEY,
Clerk of the Supreme Court of the United States.

You therefore are hereby commanded that such action be had in said cause as by the mandate of the said Supreme Court of the United States may be proper the said appeal notwithstanding.

Witness the Honorable Alfred Franklin, Chief Justice of the Supreme Court of the State of Arizona, the 3d day of February, in the year of our Lord, 1913.

(Enumeration of costs.)

J. P. DILLON,
Clerk Supreme Court, State of Arizona.

(Filed in Superior Court February 4, 1913.)

(Title of Cause.)

Motion for Judgment, Decree, and Orders.

Now for the purpose of making the records of this court comply with the said mandates of the Supreme Court of the United States, and of the Supreme Court of the State of Arizona, and for

12 the purpose of effectuating such parts of said mandates as apparently require immediate action on the part of this court, the plaintiff herein moves this Honorable Court, that it make an order fixing the amount of the bond of Hiram W. Fenner, who, heretofore and on the 30th day of July, 1908, in this case, was appointed receiver of all the property, money, books and assets of any kind and character, of, or belonging to the said Silver Bell Copper Company; that this court further order that the said receiver, Hiram W. Fenner, without delay execute the usual oath of office and give and execute bond in such sum as shall be fixed as aforesaid

by this court, in the usual form of receiver's bonds, to be approved by this court for the faithful performance of his duties as receiver, and that the said Hiram W. Fenner as said receiver, immediately upon the filing of his oath, and the approval of his bond as aforesaid be ordered and directed to take immediate possession of all the moneys, books, papers, property and other assets of the said Silver Bell Copper Company, and hold, dispose of and disburse the same in accordance with the orders to be made by this court from time to time hereafter; and that said receiver immediately proceed in all matters as ordered and directed in said judgment and decree entered in this case on the 30th day of July, 1908.

E. A. MESERVE,
FRANK H. HEREFORD,
Attorneys for Plaintiff.

(Filed February 5, 1913.)

(Title of Cause.)

Affidavit for Change of Venue.

STATE OF ARIZONA,
County of Pima, ss:

Albert Steinfeld being duly sworn, deposes and says; that he is one of the defendants in the above entitled action; that affiant has cause to believe and does believe that on account of the bias of Wm. F. Cooper, Judge of the Superior Court of the State of Arizona, in and for the County of Pima, he cannot obtain a fair and impartial trial of the said action; affiant further says that prior to his election and during the pendency of this action the said Wm. F. Cooper was associated in the practice of the law with Frank H. Hereford, Esq., one of the counsel for the plaintiffs in the said action.

ALBERT STEINFELD.

(Duly verified.)

[SEAL.]

(Filed March 1, 1913. By agreement deemed to be filed February 18, 1913.)

14

(Title of Court and Cause.)

Objections of Plaintiff to Change of Venue.

Now comes the plaintiff herein and demurs to and objects to the granting of defendant Steinfeld's motion for a change of venue, or judge in the above entitled action, and amongst other objections thereto, this plaintiff alleges that the above entitled action has been tried and determined that there remains nothing to be done in said action except to enter a judgment and decree in accordance with the opinion of the Supreme Court of the United States, and the mandates of the Supreme Court of the United States to the Supreme

Court of the State of Arizona and the Supreme Court of the State of Arizona to the above entitled court, and to have such accounting as under and by said decision is made necessary.

That the above entitled case has been fully tried and the issues raised by the pleadings each and all determined; that such matters or things as remain to be done are matters and things relating solely to the transaction and conducting of the business of the Silver Bell Copper Company, one of the defendants herein, in the collection of its assets, the payment of its debts, its dissolution and the distribution of its moneys amongst its stockholders.

15 Wherefore this plaintiff prays that defendant's Steinfeld's motion for change of venue be denied.

E. A. MESERVE,
FRANK H. HEREFORD,
Attorneys for Plaintiff Louis Zeckendorf.

(Filed March 1, 1913.)

(Title of Court and Cause.)

Affidavit of Frank H. Hereford in Opposition to Defendant Steinfeld's Motion for Change of Venue.

STATE OF ARIZONA,
County of Pima, ss:

Frank H. Hereford, being first duly sworn, deposes and says that he is one of the attorneys for the plaintiff in the above entitled action; that he has read the affidavit of Albert Steinfeld, dated the 18th day of February, 1913, and filed in the above entitled action, and more particularly the allegation therein, that William F. Cooper was associated in the practice of the law with Frank H. Hereford, Esq., one of the counsel for plaintiff in this action, during the pendency of this action. That the statement is incorrect; that the

16 said William F. Cooper was never at any time since the institution of this action, associated with the said Frank H.

Hereford, and more particularly was never associated with the said Frank H. Hereford in this case, or in any manner pertaining thereto. That many years ago and possibly after the institution of this suit, the said William F. Cooper was, for about two weeks, employed in the office of said Frank H. Hereford, but that his employment was upon other matters and things, and to the best of the recollection of your affiant, the said William F. Cooper while in the office of said Frank H. Hereford never had anything or any kind or character to do with, or in relation to this case.

FRANK H. HEREFORD.

(Duly verified.)

(Filed March 1, 1913.)

(Title of Cause.)

Amended Motion for Judgment and Decree.

Now comes Louis Zeckendorf, the plaintiff in the above entitled action, and moves this Honorable Court as follows, to-wit:

Whereas heretofore, and on July 30, 1908, the District Court of the First Judicial District of the Territory of Arizona in and for the County of Pima, in the above entitled case of Louis Zeckendorf, plaintiff, vs. Albert Steinfeld, R. K. Shelton, J. N. Curtis, Silver Bell Copper Company; a corporation, Mammoth Copper Company, a corporation, defendants entered and docketed a certain judgment and decree which was in the words and figures following, to-wit:

"This cause came on regularly for trial before the Court, Honorable John H. Campbell, Judge thereof, presiding, sitting without a jury, (a jury having been theretofore regularly waived by all parties) on the 2nd day of January, 1908, all parties being present in person, and also by their attorneys; evidence, oral and documentary, having been regularly introduced and offered by the respective parties and received by the Court, the cause was in regular order and in due course and form argued to the Court, and submitted to it for its decision; after due consideration of the pleadings and of all admitted evidence in the case, and being fully advised in the premises, wherefore by virtue of the law and the premises aforesaid, it is hereby ordered, adjudged and decreed:

"First. That the plaintiff recover nothing upon the first cause of action in the complaint set forth, and as to the said first cause of action the defendants go hence without day.

Second. That Albert Steinfeld upon the second cause of action in said complaint set forth, pay the defendant the Silver Bell Copper Company, and that the said Silver Bell Copper Company do have and recover from said Albert Steinfeld, the sum of \$20,850, with interest thereon at the rate of six per cent per annum from the 20th day of January, 1904; that plaintiff do have execution for the said sum of \$20,850.00, and interest thereon from said date against the said Albert Steinfeld, the recoveries on said execution to be paid to the defendant, the Silver Bell Copper Company, or to the receiver of said company to be appointed as in his judgment provided.

Third. That L. Zeckendorf, plaintiff in the above entitled action, do have and recover of and from Albert Steinfeld his, plaintiff's costs in this action, herein taxed at the sum of \$662.60, and that plaintiff do have execution in his favor, and against said defendant therefor.

Fourth. That plaintiff, out of the said money recovered and to be recovered by said Silver Bell Copper Company from the said Albert Steinfeld, do have and recover of and from the said Silver Bell Copper Company, and be paid by the said Silver Bell Copper Company, the sum of \$2,652.50 as and for attorney's fees for the bringing of this action and the prosecution of the same up to and in-

cluding the entry of this judgment; and it is further ordered that the receiver hereafter to be appointed herein and hereafter
19 named, do pay to said plaintiff the said sum of \$2,652.50 out of the said moneys to be recovered by said Silver Bell Copper Company from said Albert Steinfeld.

"It is further ordered, adjudged and decreed, and the court does hereby order that Hiram W. Fenner be, and he is, hereby appointed receiver of all property, money, book and assets of any kind or character of or belonging to the said Silver Bell Copper Company and any person or persons having any money or assets belonging to the said Silver Bell Copper Company are hereby ordered to turn over and deliver the same to the said receiver, the same to be held by the said receiver and retained and kept in possession, and to be distributed, paid out and disbursed upon the orders of the court to be made from time to time in this action; said receiver to execute the usual oath of office and to give and execute bond in the sum of \$— in the usual form of receiver's bond to be approved by this Court, for the faithful performance by him of his duties as receiver; and the said Hiram W. Fenner as such receiver, immediately upon the filing of his oath and the approval of his bond, as aforesaid, is hereby ordered and directed to take immediate possession of all the moneys, property and other assets of the said Silver Bell Copper Company, and to hold and disburse the same in
20 accordance with the orders and judgment herein contained, and in accordance with the orders to be made by this Court from time to time hereafter.

It is further ordered, adjudged and decreed that upon the final termination of this action, the said Silver Bell Copper Company shall be dissolved, and that thereupon all its debts and liabilities shall then be paid and discharged, and thereupon all property, money and assets of such corporation then remaining shall be distributed among its stockholders in the proportions of their several ownership of stock.

The said dissolution, payments, disbursements and distributions to be done and accomplished by orders of this Court for that purpose in this action made and to be made.

It is further ordered, adjudged and decreed that Albert Steinfeld holds the sum of \$25,750 money of said Silver Bell Copper Company in his hands as and for security to him in the action of Franklin vs. Silver Bell Copper Company, said Steinfeld to account to said corporation or to the receiver of said corporation hereafter appointed for said sum immediately upon the final determination and settlement of this action, and to pay the said Silver Bell Copper Company or to such receiver the balance of said sum, if any, after deducting therefrom such sums, if any, that said Steinfeld may properly and in accordance with law pay or have paid for the
21 benefit of the said Silver Bell Copper Company.

Done in open court this 30th day of July, 1908.

JOHN H. CAMPBELL, *Judge*.

"Filed October 4, 1908."

And whereas, thereafter and in due time and in due form, the plaintiff in said action appealed to the Supreme Court of the Territory of Arizona from such judgment, and the defendants in said action on the same day that plaintiff's appeal was taken, and in due form, appealed to the Supreme Court of the Territory of Arizona, from said judgment; and thereafter said cross appeals from said judgment were duly perfected, and the record thereof made before the Supreme Court of the Territory in the manner provided by law, and the rules of said Court, and thereafter said appeals came on regularly for hearing before said Court, whereon and on the 20th day of March, 1909, by opinion and decision duly filed in said Court, the said Supreme Court of the Territory affirmed said judgment and gave judgment that the Silver Bell Copper Company, a corporation, do have and recover of and from Albert Steinfeld one of the appellants, and Epes Randolph and Leo Goldschmidt, his bondsmen on appeal, the amount of the judgment rendered in the trial court in favor of the defendant, the Silver Bell Copper Company, as above specified, and that Louis Zeckendorf, the plaintiff, do have and recover of and from Albert Steinfeld, one of the appellants, and Hugo J. Donaud and L. Rosenstern, sureties on the appeal bond, his, plaintiff's costs in the court below, in this cause incurred; and thereafter, and in due course, on the 1st day of May, 1909, being one of the regular judicial days of the January term of said Supreme Court, Louis Zeckendorf, as appellant, in open court, gave notice of his appeal to the Supreme Court of the United States from the judgment of said Court, and the said plaintiff thereupon thereby appealed to said Supreme Court of the United States from said judgment of the Supreme Court of the Territory of Arizona, and on the same day the defendants gave notice of a cross appeal to the Supreme Court of the United States from the said judgment of the Supreme Court of the Territory of Arizona, and both the plaintiff and the defendants, in the form required by law gave notice of appeal and application for appeal, and gave the required bonds on appeal, to the Supreme Court of the United States from said judgment; and thereafter, the said cause was regularly docketed in the Supreme Court of the United States in the October term, 1911, of said Court, the appeal by Louis Zeckendorf, plaintiff, being entitled as follows, on the files of said October term of said Supreme Court of the United States, viz: "No. 139. Louis Zeckendorf, appellant, vs. Albert Steinfeld, J. N. Curtis, R. K. Shelton, et al." and the appeals of the defendants being entitled on said term of court as follows: "No. 140. Albert Steinfeld, J. N. Curtis, R. K. Shelton, et al., appellants vs. Louis Zeckendorf and Silver Bell Copper Company."

And thereafter, and in due course, said appeals were perfected, and the record thereon made in the manner required by law, to the Supreme Court of the United States; Whereupon, and on the 1st day of March, 1912, both said appeals were argued to the Supreme Court of the United States by the respective counsel for the parties to said appeals, and said appeals were regularly sub-

mitted to the Supreme Court of the United States for its decision, whereupon, and on the 7th day of June, 1912, the said Supreme Court of the United States duly made, gave and rendered its judgment in said cause, and on said appeals, wherein and
24 whereby it ordered judgment in accordance with the opinion that it rendered, and as shown by the mandate of said court to the Supreme Court of the State; and whereas, on the 23d day of November, 1912, the mandate from the Supreme Court of the United States on said appeals in said cause was regularly issued to and came down to the Supreme Court of Arizona, and was received by said Court and filed therein and in said matter, commanding said Court to cause judgment to be entered in this cause, in accordance with the decision and opinion of said Supreme Court of the United States, accompanying said mandate; that thereafter, and in accordance with the law and the rules and practices of said Supreme Court of Arizona, said Court, on the 3d day of February, 1913, issued its mandate to this Court, directing that judgment of this Court be made, given and entered in this cause, in accordance with said mandate of the Supreme Court of the United States, and in accordance with its decision and opinion.

Plaintiff moves this Honorable Court for a judgment and decree in the above entitled action in accordance with the said mandates of the Supreme Court of the United States, and the Supreme Court of the State of Arizona, in the following language, or to
25 the following effect:

"The motion of Louis Zeckendorf, plaintiff herein, that this Court enter a judgment and decree in this case in accordance with the mandates of the Supreme Court of the United States, and the Supreme Court of the State of Arizona coming on regularly to be heard, the plaintiff being present and represented by his attorneys, Honorables E. A. Meserve and Frank H. Hereford, and the defendants being present and represented by their attorneys, Honorables Eugene S. Ives and Francis J. Heney, and the matter having been argued and submitted to this court for its decision, and the court being fully advised in the matter, does grant the said motion; and as it appears that this cause came on regularly for trial before the District Court of the First Judicial District, Territory of Arizona, County of Pima, Honorable John H. Campbell, Judge thereof presiding, (a jury having been theretofore regularly waived by all parties), on the 2d day of January, 1908, all parties being present in person and also by their attorneys, evidence oral and documentary having regularly been introduced and offered by the respective parties and received by the court, and the cause having been in regular
26 order and in due course and form argued to the court and submitted to it for its decision, and after due consideration of the pleadings and of all admitted evidence in the case, and after being fully advised in the premises, and under and by virtue of the law and the premises aforesaid, the Court having regularly entered its judgment and decree in said case; and as it further appears that appeals by both plaintiff and defendant were taken in due order

and time from the said judgment and decree to the Supreme Court of the Territory of Arizona, which in due course and time rendered its judgment and decree affirming the judgment and decree entered by the Lower Court and that thereafter in due course and time, appeals were taken by all parties to the Supreme Court of the United States, from the judgment and decree of the Supreme Court of the Territory of Arizona; and as it further appears that hereafter and in due course and time the Supreme Court of the United States approved and affirmed so much of the said judgment rendered by the Lower Court, as related to the second cause of action in plaintiff's complaint set forth, and reversed and remanded for further proceedings not inconsistent with the opinion of the Supreme Court of the United States, so much of said judgment, and all matters connected therewith, as related to the first cause of action in plaintiff's complaint set forth; and as it further appears from the mandates of the Supreme Court of the United States and the Supreme Court of the State of Arizona, that this court is required to enter such judgment and decree and take such further action as is necessary to effectuate and enforce the mandates of said Supreme Courts of the United States and of the State of Arizona, and in accordance with the views expressed in the decision rendered by the Supreme Court of the United States in this matter.

Now, Therefore, it is ordered, adjudged and decreed:

"First. That Hiram W. Fenner be, and he is, hereby appointed receiver of all property, money, books and assets of any kind or character, of or belonging to the said Silver Bell Copper Company, and any person and all persons having any books, money, property or assets belonging to the said Silver Bell Copper Company are hereby ordered to turn over and deliver the same to the said receiver. That the said receiver hold, retain and keep the same in possession to be distributed, disposed of, paid out and disbursed upon the orders of this court, to be made from time to time in this action; that the said receiver execute the usual oath of office and give and execute a bond in the sum of \$—, in the usual form of a receiver's bond, to be approved by this court, for the faithful performance by him, of his duties as receiver, and the said Hiram W. Fenner as such receiver, immediately upon filing of his oath and the approval of his bond as aforesaid, hereby ordered and directed to take immediate possession of all the moneys, property, books, papers and other assets of the said Silver Bell Copper Company, and to hold, dispose of and disburse the same in accordance with the orders and judgment herein contained, and in accordance with the orders to be made by this Court from time to time hereafter.

Second. That Albert Steinfeld upon the first cause of action set forth in plaintiff's complaint herein, pay to Hiram W. Fenner as receiver of the Silver Bell Copper Company for and on behalf of, and as the property of the Silver Bell Copper Company, the sum of one hundred and twenty-seven thousand six hundred twenty-five dollars and seventy-five cents (being the amount of one hun-

dred forty-five thousand seven hundred forty-three dollars and seventy-five cents, less the sum of eighteen thousand one hundred seventeen dollars), together with interest thereon at the rate of six (6) per cent per annum from January 16, 1904, to date, viz: March 1, 1913, said interest amounting to sixty-nine thousand eight hundred and seventy-five dollars and sixty-four cents making a total at this date, principal and interest of one hundred ninety-seven thousand five hundred and two dollars and thirty-nine cents; and that the said Silver Bell Copper Company have judgment against the said Albert Steinfeld for said sum of one hundred ninety-seven thousand five hundred and two dollars and thirty-nine cents with interest from date till paid at six per cent per annum and that execution issue therefor against the said Albert Steinfeld and his property.

Third. That Albert Steinfeld upon the first cause of action in said complaint set forth, pay to Hiram W. Fenner, the receiver of the said Silver Bell Copper Company for and on behalf of, and as the property of the said Silver Bell Copper Company, the further sum of one hundred thousand dollars, together with interest thereon at the rate of six (6) per cent per annum from May 20, 1903, to date, viz: March 1st, 1913, said interest amounting to fifty-eight thousand eight hundred thirty-three dollars and thirty-three cents, making a total amount at this date, principal and interest, one hundred fifty-eight thousand eight hundred thirty-three dollars and thirty-three cents; and that the said Silver Bell Copper Company have judgment against the said Albert Steinfeld for the said sum of one hundred fifty-eight thousand eight hundred and thirty-three dollars and thirty-three cents with interest from date till paid at six per cent per annum. And that execution issue therefor against the said Albert Steinfeld and his property.

Fourth. That the said Albert Steinfeld upon the first cause of action in said complaint set forth, pay to the said Hiram W. Fenner, receiver of the said Silver Bell Copper Company as said receiver, for and on behalf of, and as the property of the said Silver Bell Copper Company, the further sum of twenty-five thousand, seven hundred fifty dollars together with interest thereon from January 16, 1904, to date, viz: March 1st, 1913 at six (6) per cent per annum, amounting to the sum of fourteen thousand ninety-eight dollars and eleven cents, said principal and interest amounting all told, this first day of March, 1913, to thirty-nine thousand eight hundred forty-eight dollars and eleven cents; and that the Silver Bell Copper Company do have judgment against the said Albert Steinfeld for the said sum of thirty-nine thousand eight hundred and forty-eight dollars and eleven cents with interest from date till paid at six per cent per annum but that execution therefor do not issue till the further order of this court.

Fifth. That the said Albert Steinfeld, and his bondsmen on appeal, Epes Randolph, Leo Goldschmidt, George Pusch and Fred Fleishman, upon the second cause of action in said complaint set forth, pay to Hiram W. Fenner, the receiver of the

Silver Bell Copper Company, for and on behalf of, and as the property of the said Silver Bell Copper Company, and that the said Silver Bell Copper Company do have judgment against the said Albert Steinfeld, Epes Randolph, Leo Goldschmidt, George Pusch and Fred Fleishman for the further sum of twenty thousand eight hundred and fifty dollars with interest thereon at the rate of six per cent per annum from the 20th day of January, 1904, to the 30th day of July, 1908, amounting, principal and interest on said 30th day of July, 1908, to twenty-six thousand five hundred and fourteen dollars and twenty-five cents, together with interest on said twenty-six thousand five hundred and fourteen dollars and twenty-five cents at the rate of six per cent per annum from said July 30, 1908, till paid and that execution issue therefor against the said Albert Steinfeld, Epes Randolph, Leo Goldschmidt, George Pusch and Fred Fleishman and each thereof and their property and the property of each thereof.

32 Sixth. That the said Albert Steinfeld and Hugo J. Donau and L. Rosenstern pay to Louis Zeckendorf, plaintiff in the above entitled action, and that the said Louis Zeckendorf do have and recover of and from the said Albert Steinfeld, Hugo J. Donau and L. Rosenstern, plaintiff's costs heretofore taxed and allowed in the said Judgment of July 30, 1908, at the sum of six hundred sixty-two dollars and sixty cents, together with interest thereon at the rate of six (6) per cent per annum from the 30th day of July, 1908, till paid, and that plaintiff do have execution therefor in his favor and against said defendant Albert Steinfeld, and the sureties on his said cost bond, viz: Hugo J. Donau and L. Rosenstern and each thereof and against the property of them and each thereof.

Seventh. That Louis Zeckendorf, plaintiff in the above entitled action do have and recover of and from Albert Steinfeld and George Pusch and Fred Fleishman, his plaintiff's costs, on appeal from the Supreme Court of the State of Arizona, to the Supreme Court of the United States, amounting to seventeen hundred and two dollars and sixty-four cents together with interest thereon from this date till paid, at the rate of six (6) per cent per annum, and that plaintiff do have
33 therefor execution in his favor and against the said defendant Albert Steinfeld, and the said George Pusch and Fred Fleishman, the sureties of the said Steinfeld on appeal as aforesaid, and each thereof, and against the property of them and each thereof.

Eight. That plaintiff out of said money recovered and to be recovered by said Silver Bell Copper Company, from said Albert Steinfeld, do have and recover of and from said Silver Bell Copper Company and the receiver of said company; and the receiver of said company is hereby authorized and directed to pay to said plaintiff, as and for attorneys' fees to Honorables E. A. Meserve and Frank H. Hereford, for the bringing of this action, and the prosecution of the same insofar as relates to said second cause of action up to and including the entry of the judgment of July 30, 1908, the sum of

two thousand and six hundred fifty-two dollars and fifty cents, together with interest thereon from the said 30th day of July, 1908, till paid, at the rate of six (6) per cent per annum.

Ninth. That plaintiff out of the said moneys recovered and to be recovered by Silver Bell Copper Company from the said Albert Steinfeld, do have and recover of and from the said Silver Bell Copper Company, and the receiver of the said Silver Bell Copper Company is hereby authorized and directed to pay to plaintiff as additional attorneys' fees for said Honorables E. A. Meserve and Frank H. Hereford for bringing this action, and the prosecution of same up to and including the entry of this judgment, the sum of thirty-nine thousand six hundred and eighteen dollars and thirty-eight cents with interest thereon from date till paid at the rate of six per cent per annum.

Tenth. That the said Hiram W. Fenner as receiver, and out of the moneys which may be paid to him by the said Albert Steinfeld, and which shall be recovered from said Steinfeld or his bondsmen in this action, shall pay to Louis Zeckendorf, plaintiff herein, in addition to the attorneys' fees and court costs hereinbefore ordered to be paid, all costs, expenses and obligations incurred by the said plaintiff in this litigation, and not herein otherwise allowed; after an account of same has been presented, audited and approved by this court.

Eleventh. That the said Hiram W. Fenner as said receiver out of the moneys which may be paid to him by the said Albert Steinfeld, and which shall be recovered from said Steinfeld in this action, shall pay to said Albert Steinfeld all sums of money heretofore necessarily paid by the said Steinfeld for and on account of the said Silver Bell Copper Company, after an account of the same has been presented, audited and approved by this court; that upon the final termination of this action, the said Silver Bell Copper Company shall be dissolved, and that thereupon all its debts and liabilities remaining unpaid, shall then, under the direction of this court, be paid and discharged, and all of its property, money and assets then remaining, shall, under the direction of this court, be distributed amongst its stockholders, in the proportion of their several ownerships of stock; that said dissolution payment, disbursements and distributions, are to be made, done and accomplished by orders of this court, for that purpose in this action made, and to be made.

E. A. MESERVE,
FRANK H. HEREFORD,
Attorneys for Plaintiff.

(Filed March 1, 1913.)

Exceptions of Defendant to Motion for Judgment.

Now comes Albert Steinfeld, a defendant in the above entitled action, and opposes the motion of Louis Zeckendorf, the plaintiff

herein, for a judgment and decree in form and substance as set forth in his aforesaid motion, and objects and takes exceptions to so much thereof as relates to the first cause of action set forth in the plaintiff's third amended complaint herein, and also particularly to certain specific portions as hereinafter appears or so much thereof as relates to said first cause of action, upon the following grounds, to wit:

First. That the opinion and judgment of the Supreme Court of the United States in the aforesaid cause, does not, in effect or otherwise, direct or order judgment to be entered by this court or by the Supreme Court of this State against the said defendant Albert Steinfeld, upon said first cause of action, and that the mandate of the aforesaid Supreme Court of the United States in this cause, does not in effect direct or order judgment to be entered by this court of by the Supreme Court of this State against said Albert Steinfeld upon said first cause of action.

37 Second. That the judgment of this court heretofore made and entered upon the second trial of said cause on said first cause of action, has not been reversed or modified by the only court which had or has power or jurisdiction so to do, to wit: The Supreme Court of the Territory of Arizona, or the Supreme Court of this State.

Third. That the aforesaid judgment of this court upon said first cause of action was duly affirmed by the Supreme Court of the Territory of Arizona, and was never thereafter reversed or modified by said court, and has never thereafter been reversed or modified by the Supreme Court of this State.

Fourth. The opinion of the Supreme Court of the United States in said cause, in effect, authorizes, directs and orders a new trial by this court upon the first cause of action set forth by plaintiff L. Zeckendorf, in his third amended complaint in said cause, to be had in conformity with the opinion and judgment of said court in relation to said first cause of action because said Supreme Court of the United States closes its opinion and judgment with the following language, to wit:

38 "It follows that the judgment of the Supreme Court of the Territory of Arizona should be reversed insofar as it affirms the judgment of the District Court on the first cause of action, and affirmed insofar as the Supreme Court affirms the District Court on the second cause of action, and the case remanded to the Supreme Court of the State of Arizona as successor of the territorial Supreme Court for such further proceedings as may not be inconsistent with the opinion of this court."

Fifth. That the mandate of the Supreme Court of the United States to the Supreme Court of this State in the above entitled cause, does in effect, authorize, direct and order a new trial by this court upon said first cause of action in the above entitled cause; after reciting the judgment of the United States Supreme Court as the same appears in the opinion thereof the mandate adds:

"You therefore are hereby commanded that such execution and further proceedings be had in said cause in conformity with the opinion and judgment of the court as according to right and justice

and the laws of the United States ought to be had, said appeals notwithstanding."

And because it is obvious that the words "that such execution be had in said cause as according to right and justice and the laws of the United States ought to be had," do apply, and can apply
39 only to the aforesaid second cause of action, as to which the judgment heretofore entered by the District Court in this case, was affirmed by the Supreme Court of the Territory and reaffirmed by the Supreme Court of the United States, and which has therefore become *res adjudicata*, and upon which execution may now be had without further, other and preliminary proceedings, to establish what is right and just according to the laws of the United States in the premises; and because it is manifest that the words "further proceedings be had in said cause in conformity with the opinion and judgment of the court as according to right and justice and the laws of the United States ought to be had," refer to said first cause of action, and specifically require this court and the Supreme Court of the State, in effect, to take such further proceedings in relation to the aforesaid first cause of action as shall in the opinion of this court in exercising sound, judicial discretion be according to right and justice and the laws of the United States; provided, however, that such "proceedings" so to be taken by this court shall be in conformity with the opinion and judgment of the Supreme Court of the
40 United States, and not inconsistent with the law applicable to this case as expressed by said Supreme Court of the United States in its said opinion, insofar as it relates to the first cause of action.

Sixth. That the mandate of the Supreme Court of the State of Arizona does not direct or order judgment to be entered by this court against said defendant Albert Steinfeld without further, other and preliminary proceedings; or, in other words, without that this court first proceed to re-try the said case upon such first cause of action, keeping in mind the law of the case as laid down in its opinion herein by the Supreme Court of the United States, and doing nothing inconsistent therewith but trying and deciding the case in conformity with said opinion and the law thereof, so rendered by the said Supreme Court and according to right and justice and the laws of the United States.

On the contrary, the mandate of the Supreme Court of this State, after reciting the judgment of the District Court on appeal to the Supreme Court of the Territory, the judgment of the Supreme Court of the Territory on the appeal to the Supreme Court of the United States and the judgment of the Supreme Court of the United States, proceeds as follows:

41 "You, therefore, are hereby commanded that such action be had in said cause as by the mandate of the said Supreme Court of the United States may be proper, the said appeal notwithstanding."

It is obvious, therefore, that the mandate of the Supreme Court of the State contemplates that this court shall exercise sound judicial discretion in determining what action in this cause under the lan-

guage of the mandate of the Supreme Court of the United States "may be proper," and to proceed accordingly; and consequently said mandate of the Supreme Court of the State of Arizona, in effect, authorizes, directs and commands this court in the exercise of sound discretion to first examine the entire record of the proceedings in this cause, and upon such further examination and in the exercise of sound judicial discretion, to determine what further proceedings ought to be had in this court in relation to said first cause of action, in order that right and justice may prevail in this cause, in accordance with the laws of the United States, and in conformity with the principles of law laid down by the Supreme Court of the United States upon the facts in relation to said first cause of action as they

42 were made to appear to that court, solely by the statement of the facts, in the nature of a special verdict which was sent there by the Supreme Court of the Territory; and by the application of such principles of law and of the laws of the United States to any other or new or additional or different facts or state of facts which may appear from an examination of the entire evidence in the case, or which may be produced upon a new trial of this case upon such first cause of action, if this court in the exercise of its aforesaid judicial discretion shall determine that such new trial would be proper.

Seventh. That upon the first trial of this cause insofar as it relates to the first cause of action, the plaintiff proceeded upon the theory—and his first complaint was drawn upon the theory—that the defendant, the Silver Bell Copper Company, was entitled to recover judgment against Albert Steinfeld for the entire proceeds of the sale of the whole group of mines including that portion thereof known as the English group, upon either one or both of two propositions:

A. That Albert Steinfeld acquired and at all times held the English group of mines as trustee for the Silver Bell Copper Company; and

43 B. That the ownership of the entire proceeds of the sale was vested in the Silver Bell Copper Company (regardless of what the prior rights of Steinfeld or the Company in said English group of mines may have been) by virtue of an offer asserted to have been made by Steinfeld, and to have been accepted by said corporation on May 20th, 1903, as evidenced by certain resolutions which appear in the minute books of the corporation, and by a certain written agreement dated May 20th, 1903, and executed by Albert Steinfeld, the Mammoth Copper Company and the Silver Bell Copper Company; and that if said written contract of May 20, 1903, was actually rescinded by the unanimous vote of the stockholders of said Silver Bell Copper Company at their stockholders' meeting on December 25th, 1903, and by the action of the Board of Directors on said day and the contract of rescission executed in pursuance thereof, such rescission did not re-invest Albert Steinfeld with the legal or equitable right to any share of the proceeds of said sale, based upon any claim which he had asserted or might assert of his individual ownership of the so-called English group of mines at the time of the sale, for the reasons:

44 a. That Albert Steinfeld acquired and held the English group of mines as trustee for the Silver Bell Copper Company with the right to be reimbursed only for the amount of money he had actually expended and paid in securing the title thereto; and that consequently the right of the Silver Bell Copper Company to the whole of the proceeds of sale of the entire group of mines, was not dependent to any extent upon the execution or existence of the written agreement of May 20, 1903, or upon the aforesaid resolutions, or any of them which appear in the minute book of the Silver Bell Copper Company as of date May 20, 1903.

b. That the rescission by the unanimous consent of the stockholders of the Silver Bell Copper Company, and of Albert Steinfeld and the Mammoth Copper Company of said written agreement of May 20, 1903, did not affect in any way, the ownership of that part of the proceeds of the sale which may have been paid as a consideration of the English group of mines, because, as evidenced by the aforesaid resolutions in the minute book of the Silver Bell Copper Company, the right of Albert Steinfeld to any part of such proceeds of sale on account of his individual ownership of said English group of mines, was assigned for a valuable consideration to the Silver Bell Copper Company on May 20, 1903, by an alleged oral offer which was reported to the Board of Directors of said Company at their meeting on said day, by the President thereof, and which was asserted to have been accepted by said Board of Directors, by a specific resolution in relation thereto, which was not in any way dependent upon the aforesaid written agreement of May 29, 1903, although the latter specifically recites that,

"Whereas the parties hereto desire to settle and determine as between themselves what disposition shall be made of the proceeds of said sale; and * * *

Now, therefore, in consideration of the premises and of the sum of One Dollar by each of the parties hereto to the other in hand paid, receipt whereof is hereby acknowledged, does hereby mutually agree that the purchase price paid and to be paid upon the sale, shall belong to and be the property of the said Silver Bell Copper Company."

And although it further appears from the aforesaid resolutions set forth in said minute book of the Silver Bell Copper Company, and upon which the plaintiff relied to sustain his contention that each and all of the conditions and terms and obligations set forth in said agreement of May 20th, 1903, to be performed by said Silver
46 Bell Copper Company, or to be enjoyed by said Albert Steinfeld, were embodied in said oral offer which was asserted to have been made by Albert Steinfeld to said Silver Bell Copper Company, and to have been accepted by said company on May 20, 1903, as evidenced by the aforesaid specific resolution relating thereto, which appears in said minute book.

The trial court upon both trials of this case, made a finding of fact in relation to said written agreement of May 20, 1903, as follows, to wit:

"That the terms of this agreement and that it should be executed were, however, all agreed upon before the said sale was completed, or

said money was paid, or said notes executed by the said Imperial Copper Company."

The true scope and meaning of the agreement of May 20th, 1903, are evidenced by the so-called "Long Agreement," thereafter set forth, wherein the meaning of the parties was more fully and specifically expressed, and which was prepared in writing by Selim M. Franklin, as the attorney for the Silver Bell Copper Company, and that all of the parties who participated in the execution of the written agreement of May 20, 1903, as well as Selim M. Franklin, 47 who prepared said later agreement which was executed and said "Long Agreement," testified that said "Long Agreement" contained and expressed the true meaning and intent of the parties, as consummated in said written agreement of May 20, 1903; and that the proposed long form of agreement was not used, solely because Albert Steinfeld preferred to have the intent and meaning of the parties, as they are set forth and expressed in briefer and shorter form in the executed agreement of May 20th, 1903. Said "long agreement" appears at page — of the transcript of appeal in the Supreme Court of the Territory and is as follows:

EXHIBIT 133.

This agreement made this 20th day of May, 1903, by and between the Silver Bell Copper Company, a corporation, organized under the laws of the Territory of Arizona, by its president and secretary, hereunto duly authorized by its board of directors, and a resolution of its stockholders, the party of the first part, and Albert Steinfeld of Tucson, Arizona, the party of the second part, and the Mammoth Copper Company, a corporation organized and existing under the laws of the Territory of Arizona by its president and secretary hereunto duly authorized by resolution of its board of directors and a resolution of its stockholders, the party of the third part,

48 Witnesseth, Whereas, the parties hereto have this day agreed to sell to the Imperial Copper Company, a corporation, certain mining claims and personal property, situated in the Silver Bell Mining District, Pima County, Arizona Territory, for the sum of \$515,000 to be paid as follows: \$115,000 in cash and the balance in four equal payments of \$100,000 each, three, six, nine and twelve months from the date hereof, with interest thereon until paid at the rate of 6 per cent per annum, and for which deferred payments said company has executed and delivered its promissory notes, payable to the order of said Silver Bell Mining Company; and the parties hereto have placed in escrow their deeds in accordance with their agreement with said Imperial Copper Company; and

Whereas, the parties hereto have signed, executed and delivered unto said Imperial Copper Company, a certain agreement of even date herewith, designated as the "Guarantee Agreement" wherein they and each of them did guarantee the titles of the mining claims in said guarantee agreement mentioned, and described in the manner

and terms as therein set forth, a copy of which said guaranteed agreement is hereto annexed; and the said two corporations, parties hereto, are desirous of securing and indemnifying said Steinfeld, 49 from any loss, charge, or expense, that might hereafter arise to him, by reason of his having signed and executed said guarantee agreement; and

Whereas, said Steinfeld did on the 15th day of July, 1901, submit an option proposition in writing to the said Silver Bell Copper Company, a copy of which said proposition is hereto annexed and made a part hereof, and did thereafter on the first day of October, 1901, for certain considerations, extend the time within which said Silver Bell Copper Company could accept said option proposition; and

Whereas, said Steinfeld has renewed said option proposition with certain modifications, namely, that the moneys required to be paid on October 15, 1901, as in said option proposition set forth shall be forthwith paid him with interest thereon from October 15th, 1901, to this date at the rate of 1 per cent per month, aggregating \$18,117.00, and that the said Silver Bell Copper Company shall transfer to him the said four promissory notes aforesaid aggregating \$400,000 as security for the faithful performance by it of the matters and things which it is to agree to do, if it accepts the said option proposition aforesaid; such notes also to be held by said Steinfeld as security and as indemnity against loss, charge or expense which may arise to him by reason of his having signed said guarantee

50 agreement, guaranteeing the titles to the mining claims, or any of them, so agreed to be sold to said Imperial Copper Company, the deed of which is in escrow as aforesaid, as well as an indemnity to him against loss that might arise to him, said Steinfeld, by reason of any obligation assumed by him in the matter of said sale, or by reason of any obligation assumed by him in the matter of said sale, or by reason of any claim or asserted claim by any person whatsoever against him, for or on account of or arising out of, or connected with the said sale and negotiations, or any part negotiations or transactions in regard to said mining claims or any of them; and

Whereas, the said Silver Bell Mining Copper Company has accepted said option proposition of said Steinfeld so modified and conditioned as aforesaid, and has agreed to make the payments and give the security and indemnity required, and whereas, the parties hereto, also desire to settle as between themselves in what manner and to what purpose the purchase money paid and to be paid by said Imperial Copper Company, upon the sale aforesaid, shall be held, applied and paid.

Now, Therefore, the said Albert Steinfeld, in consideration of the premises, and of the sum of eighteen thousand one hundred and seventeen dollars (\$18,117) to him in hand paid this day by the said Silver Bell Copper Company, receipt whereof is hereby 51 acknowledged, and in consideration of the premises and agreements of said Silver Bell Copper Company, as hereinafter set forth, by it to be kept and performed, and in consideration of the

transfer to him for the purposes hereinafter set forth, of the four promissory notes aggregating \$400,000 as hereinafter provided for, does hereby agree:

First. Forthwith, to cancel as paid, a certain promissory note executed to him by the Mammoth Copper Company for \$2,780, dated June 8th, 1900, payable one year from date with interest thereon at the rate of 1 per cent per month.

Second. To hold the 1,000 shares of the capital stock of said Mammoth Copper Company, being all the shares of the capital stock of said corporation, and to hold the three hundred shares of the capital stock of said Silver Bell Copper Company, transferred or assigned to him by Carl Nielsen and Mary Nielsen, his wife, under their agreement of date June 29th, 1900, a copy of which agreement is heretofore annexed (and which said 300 shares now stand in his name as trustee) and also to hold (subject, however, to the prior rights and interests of the Imperial Copper Company, as set forth in the agreements of sale to said company, and subject to the deeds to said Imperial Copper Company, now in escrow) the mining claims and mill sites, conveyed to him, said Steinfeld, by Frederick Clark Beckwith, Tucson Mining and Smelting Co., Limited, and Herbert B. Tenny, by their deed dated August 21, 1900; and the mining claims conveyed to him by Carl S. Nielsen, Mary Nielsen and L. B. Lewis; and the interest in mining claims conveyed to him by Margaret Francis, guardian, by deed dated October 1, 1900, and also to hold the \$12,500 promissory note and mortgage, executed to him by said Mammoth Copper Company, of date June 1, 1900 (said mortgage not being of record) as trustee, for Silver Bell Copper Company, subject to the following trusts and conditions, to-wit: namely; that upon the said Silver Bell Copper Company doing all the matters and things by said Steinfeld agreed to be done and performed as set forth in his certain agreement with Margaret Francis, dated July 16th, 1900, and upon said company paying to said Francis and Volkert, or their assigns, the sum of \$2,500, as in said agreement of May 16th, 1900, is provided shall be paid to them, and upon its paying to said Carl S. Nielsen and Mary Nielsen, his, her or their assigns or personal representatives, the sum of \$10,000 as is agreed to be done in said agreement with said Niensens of date June 29th, 1900, then he, said Steinfeld, will transfer and assign to said Silver Bell Copper Company, absolutely all of the 1,000 shares of the capital stock of said Mammoth Copper Company, and all of said 400 shares of the capital stock of said Silver Bell Copper Company, and will cancel, as paid, said promissory note for \$12,500 and the mortgage given as security therefor, and will convey to said Silver Bell Copper Company, absolutely (provided), however, that the deeds aforesaid, now in escrow, are not delivered to said Imperial Copper Company, and provided further, that said deeds in escrow are first cancelled and destroyed by reason of said last named Company having failed to make the payments as by the escrow required) all the right, title and interest acquired by him, said Steinfeld, under the said deeds so

executed to him by said Nielsens and Lewis, and the one executed to him by said Margaret Francis, a guardian.

And the Silver Bell Copper Company hereby agrees, at its own cost and expense, to do, and perform, or cause to be done and performed all the matters and things, which said Steinfeld agreed to do or perform, as set forth in his agreement with said Francis and Volkert of date May 16th, 1900 aforesaid; and said Company further agrees to pay said sum of \$10,000 to the said Nielsens, their assigns or personal representatives in accordance with said agreement of June 29, 1900; and agree to pay said sum of \$12,500 to said Francis and

Volkert, or their assigns, as in said agreement of May 16th, 54 1900, is provided, shall be paid them.

And the said Silver Bell Copper Company and said Mammoth Copper Company do further agree to secure and indemnify the said Albert Steinfeld, against any and all loss, charge or expense that may arise to him, by reason of his having guaranteed or agreed to guarantee the titles to certain of the mining claims so sold, aforesaid, to the said Imperial Copper Company, or by reason of his having signed and executed the guarantee agreement aforesaid, or that may arise to him by reason of, or out of any obligation assumed by him in the making of said sale, or by reason of or out of any claim, or asserted claim of any person, whatsoever, against him for or on account of or connected with said sale or the negotiations resulting in said sale, or any past negotiation or transaction, in regard to said mining claims, or any of them; and also to secure him against any loss, charge or expense, which may arise to him by reason of the failure of the said Silver Bell Copper Company to do or perform any of the matters or things which herein have been or may be, by it agreed to be done or performed. And to this end, and to secure and indemnify said Steinfeld, as aforesaid, all of the parties hereto agree as follows: That the sum of one hundred and fifteen thousand dollars (\$115,-

000) this day paid by said Imperial Copper Company on 55 account of the purchase price of the mining claim and property by the parties hereto this day sold to said company, shall be paid to said Silver Bell Copper Company, and that it shall apply said money as follows:

First. It shall pay the sum of \$18,117, thereof to said Albert Steinfeld, being the amount said Silver Bell Copper Company is required to pay to him under the option proposition aforesaid and which amount it does hereby pay him, the receipt whereof said Steinfeld had hereinbefore acknowledged.

Second. It shall pay the sum of Twenty-two thousand five hundred dollars (\$22,500) thereof to N. O. Murphy as his commissions upon the said sale to the Imperial Copper Company.

Third. The remainder thereof it shall pay on account of indebtedness at present due and owed by it, said Silver Bell Copper Company, to its creditors.

It is further agreed by and between the parties hereto, that the four certain promissory notes, this day executed and delivered by said Imperial Copper Company, each of said notes bearing even date herewith; payable three, six, nine and twelve months respectively

from date, to the order of the Silver Bell Copper Company, each for \$100,000 with interest at the rate of six per cent per annum until paid, shall each be endorsed by said Silver Bell Copper Company, payable to the order of Albert Steinfeld, the same and all proceeds and sums of money that may be paid thereon, to be by him kept and held subject to the following trusts and terms and provisions, that is to say:

First. He shall present for payment and collect the money due and to become due on each of said promissory notes as each becomes payable, and if the said promissory notes or any of them be not paid when due, then he shall take such proceedings or do such other matters or things in regard thereto, as he and said Silver Bell Copper Company may jointly and mutually agree on.

Second. Out of the first moneys so collected or received by him, he shall pay:

1. All the debts of said Silver Bell Copper Company then due and unpaid, and if any such debts be not then due, he shall retain sufficient of said moneys to pay the same when they become due.

2. He shall pay to Mary Nielsen, her assigns or legal representatives, and to the assigns or legal representatives of Carl S. Nielsen (said Carl S. Nielsen being now deceased) the sum of ten thousand dollars (\$10,000) in accordance with the terms and provisions of the said agreement with said Niensens of date June 29th, 1900.

3. He shall retain and pay, when due and payable; the sum of twelve thousand five hundred dollars (\$12,500) to Julius H. Volkert and Margaret Francis, or their assigns or legal representatives, in accordance with the terms and provisions of the said agreement with said Volkert and Francis of date May 16th, 1900.

Third. All the rest, remainder and balance of the moneys collected and received by him, upon said promissory notes aforesaid he shall hold and retain as security and indemnity against any loss, charge or expense that may arise to him by reason of his having guaranteed the titles to mining claims, sold or agreed to be sold to said Imperial Copper Company, or that may arise to him by reason of his having signed and executed the said guarantee agreement aforesaid, or which may arise to him by reason of, or out of any of the matters, or things, to which the said two corporations parties hereto, have hereinbefore agreed to secure and indemnify him against loss, damage or expense.

Fourth. At the expiration of one year from the date hereof, to wit, May 21, 1904, provided, however, that prior to that date there has been issued by the proper officer of the United States government land office final receipts upon the application for patent to those certain mining claims which the parties hereto in said guarantee agreement aforesaid, have agreed to have patented, if said final receipts have not by said date been issued, then upon the date of the issuance of said final receipts, and provided further that up to said time said Steinfeld has not been caused any further loss, damage or expense, by reason of any of these matters or things for which he holds the money and funds aforesaid as security and indemnity, and provided further that there be not then pending or ex-

isting any further liability for or on account of the matters and things for which he holds said money and funds as indemnity, as aforesaid, or upon the date of the issuance of said final receipts aforesaid, said Steinfeld shall repay to said Silver Bell Copper Company, the moneys and funds then remaining in his hands, and shall transfer and deliver to it any and all of said promissory notes then remaining unpaid.

Fifth. In the event the liability of said Steinfeld for and on account of said matters and things shall not be terminated on said 21st day of May, 1904, or on the subsequent date when said final receipts are issued, then he shall retain all of said money, funds and unpaid promissory notes (if any) in his hands, as security and indemnity until such a time as he is no longer liable to loss, damage or expense, for or on account of any of said matters and things aforesaid.

Sixth. In the event said Steinfeld shall suffer any loss, damage or expense, for or through or by reason of any of the matters or things to indemnify which loss, damage or expense to him he holds, and is to hold, said notes and the money that may be paid thereon, then and in such event, he is authorized to repay unto himself, and to retain for his own use and benefit, out of any of said money or funds so in his hands, the sums and amount of his said loss, damage and expense.

This agreement shall bind the successors and assigns of the said corporations, parties hereto; and the heirs, successors in trust, assigns, administrators and executors of the said Albert Steinfeld.

In Witness Whereof, the said Silver Bell Copper Company has by resolution of its board of directors, caused its corporate name to be hereto attached, and its corporate seal to be hereto affixed by its president and secretary and the said Albert Steinfeld has hereunto placed his hand and seal, and the said Mammoth Copper Company has, by a resolution of its board of directors, caused its corporate names to be hereunto attached, and its corporate seal to be hereto affixed by its president and secretary the day and year first above written. In triplicate.

SILVER BELL COPPER COMPANY,
By J. N. CURTIS, *President*.
—— ———, *Secretary*.
MAMMOTH COPPER COMPANY,
By ALBERT STEINFELD, *Secretary*.

Eighth. That upon the first trial of this case, the plaintiff relied mainly upon his contention that Albert Steinfeld had acquired and held the title to the English group of mines, as trustee for the Silver Bell Copper Company, and that the rescission of the written agreement of May 20, 1903, did not affect the right of the Silver Bell Copper Company to all of the proceeds of sale for the entire group of mines for the aforesaid reason, as well as for the additional reason, that the right of the Silver Bell Copper Company to the whole of said proceeds was fixed and determined by that certain resolution

appearing in the minute book of the Silver Bell Copper Company of date May 20, 1903, which reads as follows, to wit:

Resolved that the proposition of Albert Steinfeld as herewith submitted, be and the same hereby is, accepted, and that he, said Steinfeld, be forthwith paid by this corporation, the sum of eighteen thousand one hundred and seventeen dollars (\$18,117), and out of the first moneys received by this company upon the promissory note of the Imperial Copper Company; the said Steinfeld, as treasurer of this company shall retain sufficient moneys to pay the amount necessary to be paid to Margaret Francis and Julius Volkert under the agreement with them as aforesaid, and to pay to the assigns or legal representatives of Carl S. Nielson, (he being now deceased) and to Mary Nielson, the amount necessary to be paid under the agreement with said Nielsens aforesaid; and when the said amounts respectively become due to pay the same to the parties entitled thereto."

Ninth. That the entire proceedings at the meeting of the board of directors of the Silver Bell Copper Company, at which the last mentioned resolution was adopted, are, insofar as they are shown by the entries in the minute book of said corporation, as follows, to wit:

"A meeting of the directors of the Silver Bell Copper Company was held at the office of the company in Tucson, Arizona, on May 20, 1903, at 4 o'clock p. m., pursuant to call of the president.

Present: J. N. Curtis, President; Albert Steinfeld, Director; R. K. Shelton, Director.

The President reported that the negotiations for the sale of the properties of this corporation had been concluded. That the Imperial Copper Company, as the nominee of George A. Beaton, had agreed to purchase all the mining claims of this company in the Silver Bell Mining District, Pima County, Arizona, and all the machinery, plant and personal property used therewith; also all of the mining claims and personal property used therewith, of the Mammoth Copper Company, as well as certain other mines or interests therein which stand in the name of Albert Steinfeld, and in the individual name of the President, and to pay therefor the sum of \$515,000, as follows: the sum of \$115,000 in cash, which sum it did pay, and is now in the hands of Albert Steinfeld, Treasurer; and the balance, \$400,000 in four equal installments of \$100,000, each, payable in three, six, nine and twelve months from this date, with interest thereon until paid at 6 per cent per annum; and for which deferred payments said company executed to this company its four promissory notes, which now are also in the hands of the Treasurer.

He further reported that the necessary deeds and agreements had been executed by the President and Secretary of this Company and amongst others a Guarantee Agreement which Guarantee Agreement was also signed and executed by the Mammoth Copper Company and by said Albert Steinfeld, individually.

The said agreements were read and considered.

He further reported that the deeds so executed had been placed in escrow with the Phoenix National Bank of Phoenix, subject to certain

escrow instructions, a copy of which escrow instructions were produced and read.

He further reported that Mr. Albert Steinfeld, who had conducted the negotiations with the Imperial Copper Company had again submitted for acceptance, the proposition which he had heretofore submitted in writing on July 15th, 1901, with the modifications, however, that this company shall pay to him forthwith in cash, the sums of money which in said proposition were required to be paid on October 15th, 1901, to wit: the sum of \$15,192.45, and also shall forthwith pay in cash, interest thereon from October 15, 1901, to this date at the rate of 1 per cent per month amounting to \$2,924.55, making a total of \$18,117.00 and that this company shall also assume and pay all obligations, which he said Steinfeld, has incurred in conducting the negotiations and in making the sale of said mining claims and property to the Imperial Copper Company, and keep him free and harmless from any and all expense and loss, which may arise to him by reason of any claim or asserted claim, of any person whatsoever, for or on account of, or arising out of or connected with the present sale, and negotiations, or any past negotiations or transactions, in regard to said mining claims or any of them. And particularly that this company shall assume and pay unto N. O. Murphy, the commissions which he, said Steinfeld agreed to pay said Murphy, to wit: the sum of \$25,000, said agreement being made for and on behalf of this company; and also shall keep him harmless from loss, damage or expense, by reason of the asserted claim of one, J. M. Burnett, for commissions.

Also that this company shall indemnify him against loss, damage or expense, by reason of his having guaranteed the title to the mining claims sold, or agreed to be sold, to said Imperial Copper Company, as is set forth in the Guarantee Agreement heretofore submitted to this meeting.

The president also stated that it was necessary to adjust with the Mammoth Copper Company, the disposition that was to be made of the purchase money upon the sale. He then submitted the agreement between this company and the said Mammoth Copper Company and Albert Steinfeld on this point and also covering the matter of guarantee.

After a full consideration the following resolutions were unanimously adopted, to wit:

65 Resolved, That all the acts of the President and Secretary of this corporation, and all papers, agreements and deeds signed by them, for or on behalf of this corporation in the matter of the negotiation and sale of this Company's property to the Imperial Copper Company, be, and the same hereby are ratified, approved and confirmed.

Resolved, That the proposition of Albert Steinfeld as herewith submitted be, and the same hereby is accepted, and that he (said Steinfeld) be forthwith paid by this corporation the sum of eighteen thousand one hundred and seventeen (\$18,117) dollars, and that out of the first moneys received by this Company upon the promissory notes of the Imperial Copper Company, he, said Steinfeld, as

Treasurer of this Company, shall retain sufficient moneys to pay the amounts necessary to be paid to Margaret Francis and Julius H. Volkert under the agreement with them aforesaid; and to pay to the assigns or legal representatives of Carl S. Nielsen (he being now deceased) and to Mary Nielsen, the amount necessary to be paid under the agreement with said Niensens aforesaid; and when said amounts respectively become due, to pay the same to the parties entitled thereto.

Resolved, That Albert Steinfeld, as Treasurer of this Company be, and he is, hereby authorized to pay to N. O. Murphy whatever commissions may be coming to him.

Resolved, That the President and Secretary of this Corporation be, and they hereby are, authorized, empowered and directed, in such manner and form, as they deem necessary or proper, to indemnify said Steinfeld, against all loss, damage and expense that may arise to him by reason of his having guaranteed the titles to the properties so sold, or agreed to be sold to the said Imperial Copper Company; and that he, and they hereby are, authorized, empowered and directed to do or cause to be done all things and to execute all papers, documents or other writings, which they deem necessary in the premises.

Resolved, That the agreement this day made by the President and Secretary of this corporation with the Mammoth Copper Company and Albert Steinfeld, in regard to the disposition of the proceeds of the sale this day made to the Imperial Copper Company, and indemnifying said Steinfeld be, and the same is, hereby ratified, approved and confirmed.

The minutes of this meeting were then read and after first being amended by striking out lines 1 to 16, both inclusive, on page 46 of this book, and striking out part of line 21 and all of lines 22 and 23, on the same page the same were on motion approved as amended.

On motion the meeting adjourned, subject to the call of the President.

J. N. CURTIS, *President.*

ALBERT STEINFELD, *Director.*

R. K. SHELTON, *Secretary.*

Tenth. That it appears from the minute book that the proposition of Albert Steinfeld, referred to in the resolution number 2, relied upon by plaintiff, at said trial, consisted of each and all of the conditions and terms which are set forth in said written agreement of May 20, 1903, and that said agreement between the Silver Bell Copper Company, the Mammoth Copper Company and Albert Steinfeld of date May 20, 1903, was submitted to the Board of Directors of the Silver Bell Company at said meeting before any of said resolutions were adopted or voted upon, and that the president of the company stated to said board of directors before any action was taken whatever, that it was necessary to adjust with the Mammoth Copper Company the disposition that was to be made of the purchase money upon the sale, and that he then submitted to the

board of directors said written agreement "on this point." And also covering the matter of guaranty.

It is therefore obvious that the full, final and complete
68 agreement of the parties upon the question of the disposition that was to be made of the purchase money upon the sale and of the matter of guaranteeing Albert Steinfeld against any loss or damage arising out of his guaranty of his titles to the mines, and to keep him free and harmless from any and all expenses and loss which may arise by reason of any claim or asserted claim of any person whatsoever for or on account of or arising out of or connected with the present sale and negotiations or any business, negotiation or transaction in regard to said mining claims, or any of them, were all embodied in said written agreement of May 20, 1903, to the full extent to which any of the parties to said agreement deemed it necessary to enumerate them therein; and that consequently said written agreement of May 20, 1903, constituted the only solemn and formal act of the parties by which the title to and ownership of so much of the purchase price as was in consideration for the so-called English group of mines was vested absolutely in the Silver Bell Copper Company. That said agreement is in the words and figures following, to wit:

This agreement made this 20th day of May, 1908, between the Silver Bell Copper Company, a corporation organized and existing
under the laws of the Territory of Arizona, party of the
69 first part, and the Mammoth Copper Company, a corporation organized and existing under the laws of the Territory of Arizona, party of the second part, and Albert Steinfeld of Tucson, party of the third part, witnesseth:

Whereas, the parties hereto have this day agreed to sell certain mining claims and property to the Imperial Copper Company, a corporation, as per written agreements heretofore made, and deeds for which property are now in escrow with the Phoenix National Bank of Phoenix, Ariz., and

Whereas, the parties hereto desire to settle and determine as between themselves what disposition shall be made of the proceeds of said sale; and

Whereas, the said Albert Steinfeld has assumed certain obligations with the said Imperial Copper Company, as more fully appears in the various agreements heretofore entered into by him in making such sale, and particularly in a certain Guarantee Agreement, wherein, amongst other things, said Steinfeld guarantees the title to certain mining claims so sold or agreed to be sold, and the parties of the first and second part desire to indemnify him against loss by reason of any of the said matters or things so done by him.

Now, therefore, in consideration of the premises, and of
70 the sum of one dollar (\$1.00) by each of the parties hereto to the other in hand paid, receipt whereof is hereby acknowledged, it is hereby mutually agreed that the purchase price paid and to be paid upon the sale, shall belong to and be the property of the said Silver Bell Copper Company.

And it is further agreed that the four promissory notes of one

hundred thousand dollars (\$100,000.00) each, this day executed by the Imperial Copper Company to the Silver Bell Copper Company, upon said sale, as well as the proceeds of said promissory notes when collected, shall be held by the said Albert Steinfeld as trustee, and as security for, and indemnity against loss, damage or expense which may arise to him for or out of, or by reason of any and all obligations and liabilities which he has assumed with the said Imperial Copper Company or any other person whatever.

And it is further agreed that no dividend shall be declared by the said Silver Bell Company until the stockholders of said company shall first have fully indemnified said Albert Steinfeld against loss which might arise to him in the future, from or on account of any such obligations or liabilities so assumed by him.

In witness whereof, the said corporations, parties of the first and second part, *has* caused these presents to be signed by its President and Secretary, and its corporate seal to be hereunto affixed by resolution of its board of directors, and the said Albert Steinfeld has hereunto placed his hand and seal the day and year first above written, in triplicate.

The said written agreement of May 20, 1903, constituted the final and permanent expression of the intentions and purposes and promises theretofore orally made, by the parties thereto to each other, as a preliminary preparation for the precise and exact terms thereof, in legal phraseology and of its execution, as is usual and practically universal in the making of written agreements between parties, and especially where the parties are represented by attorney, as they were in this case. That Selim M. Franklin, the attorney for the Silver Bell Copper Company, in all of said transactions was found by the trial court to be entirely free from any influence of Albert Steinfeld.

Eleventh. That on the first trial of this case, and likewise upon the second trial of this case, the District Court found among other things, in relation to said agreement of May 20, 1903, as follows, to wit:

Twelfth. That the terms of this agreement, and that it should be executed, were, however, all agreed upon before the said sale was completed or said money was paid or said notes executed by the said Imperial Copper Company.

Thirteenth. That on the first trial of this case, the District Court also made the following finding of fact, to wit:

VIII.

"The Court does not find on the issues raised by the pleadings as to the ownership, legal or equitable, prior to said sale thereof, of the several properties described and listed in the said schedule marked "Exhibit A," attached to the plaintiff's complaint and amended complaint and filed herein, for the reason that the aforesaid agreement dated May 20, 1903, in finding VII established the ownership of the entire purchase price of the said property, cash and notes, to be in the said Silver Bell Copper Company. * * *

Thirteenth. That the defendant, Albert Steinfeld, proceeded upon

said first trial of this case in relation to the said first cause of action, and his answer was drawn upon the theory, that on and prior to May 20, 1903, he was the legal and equitable owner of the so-called English group of mines, and that they constituted by far
73 the most valuable part of the entire group of mines, which was sold on May 20, 1903, to the Imperial Copper Company; and that his individual right to that share of the entire purchase price for the entire group of mines, included in the sale, which his said individual ownership of the English group would entitle him to, was assigned and transferred to the Silver Bell Copper Company, under and by virtue of said written agreement of May 20, 1903, and solely thereby and not otherwise.

And upon the further theory that the agreement of May 20, 1903, hereinafter set forth, was fully and completely rescinded by the action of the stockholders at their meeting on December 26, 1903, and that there was no room for doubt as to the action and meaning and intent of the stockholders at such meeting, because a written copy of the written agreement of May 20, 1903, was attached to and made a part of the resolution of rescission, by Judge Wm. H. Barnes, the attorney for L. Zeckendorf (who was personally present at the meeting) immediately before the resolution was voted upon and was
74 unanimously adopted by the vote of every share of stock of the corporation; and because the plaintiff, L. Zeckendorf, had not alleged in the third amended complaint, upon which the trial was proceeding, any fact, or facts tending to show any contrary intent on the part of himself or any other stockholder, or any fact or facts tending to show misrepresentation, concealment or any other fraudulent practice on the part of Albert Steinfeld or anyone else in his behalf; or any fact or facts tending to show any mistake of any material fact by or on the part of said L. Zeckendorf, or of any other stockholder in voting in favor of the adoption of said resolution rescinding said contract of May 20, 1903.

Fourteenth. That the only allegation contained in said third amended complaint upon this subject, is in words and figures, as follows, to wit:

That prior to any attempted meeting of said board of directors, on said 26th day of December, 1903, a meeting of the stockholders of said company was held, at which this plaintiff was present, at which meeting it was agreed and understood that the contract, insofar only as it affected the custody and control of said money, so entered into under said date of May 20th, 1903, should be rescinded, and that
75 all of the money and property received from the sales of said Silver Bell Company and so in the hands of said Albert Steinfeld should be turned over by him to J. N. Curtis, who had, in the meantime, been elected treasurer as well as president of said Silver Bell Copper Company; and said Albert Steinfeld did thereupon turn said money and said property over to said J. N. Curtis as treasurer of said Silver Bell Copper Company, and as its property under and by virtue of the actions taken at said stockholders' meeting, and the same was thereafter held by said J. N. Curtis as such treasurer, as the property and money of said Silver Bell Copper Company, until

the wrongful disbursement and payment of the same as in this amended complaint alleged; that the only matters discussed at said stockholders' meeting was the question of the custody of said money and the holding thereof by said Albert Steinfeld as an indemnity to him for and on account of his guarantee to said Imperial Copper Company on the contracts entered into with said Imperial Copper Company on said 20th day of May, 1903, that at said time and at said stockholders' meeting, Mr. Eugene S. Ives, an attorney-at-law and representing said Albert Steinfeld as his attorney, was present and presented to said meeting the following resolutions as being resolutions adopted at said meeting held under date of the 20th of May, 1903, to wit:

76 "Resolved, That the agreement this day made by the President and Secretary of this corporation with the Mammoth Copper Company and Albert Steinfeld in regard to the disposition of the proceeds of the sale this day made to the Imperial Copper Company and indemnifying said Steinfeld, be and the same is hereby ratified, approved and confirmed."

"Resolved, That the president and secretary of this company be, and they are hereby authorized, empowered and directed, in such manner or form as they deem necessary or proper, to indemnify the said Albert Steinfeld against all loss, damage and expense that may to him arise by reason of his having guaranteed the titles to the property so sold or agreed to be sold to the said Imperial Copper Company, and that he and they be hereafter authorized, empowered and directed to do or cause to be done all things and to execute all papers, documents which they may deem necessary in the premises."

That no reference was made in said meeting to any other resolution than said two resolutions above set out; and all discussion and acts taken at said meeting were intended to refer to said resolutions only and not to any other resolution or resolutions adopted or passed at the meeting held under date of May 20, 1903, as hereinbefore alleged and set out.

77 And that at said stockholders' meeting it was voted to rescind said resolutions above set out and said contract of May 20, 1903, and no other or different contract or resolutions, and if the action taken at said stockholders' meeting had the effect, on its face, of rescinding any other resolutions or any other contract adopted on said 20th day of May, 1903, or under date thereof, particularly the contract entered into by the acceptance of said offer of Albert Steinfeld as to the payment to him of said sum of \$18,117.00 and the payment thereof, such action was a mistake on the part of this plaintiff and was not intended as such, and was a mistake on the part of the other stockholders of said company present at said meeting and was not intended as such.

That on the first trial of said cause, the plaintiff offered no evidence whatever tending to show any mistake of fact on the part of said Louis Zeckendorf, or any misrepresentation, concealment of other fraudulent practice on the part of said defendant, Albert Steinfeld, or of anybody on his behalf or otherwise, or at all, by which said Louis Zeckendorf was misled or deceived, or induced to take any

action which he would not otherwise have taken at said stockholders' meeting of December 26, 1903, in voting in favor of the resolution to rescind said agreement of May 20, 1903; and that said trial court upon said first trial, upon this point, made the following finding of fact, to wit:

That on the 26th day of December, 1903, a meeting of the stockholders of the defendant corporation was duly had; all of the stock of the defendant corporation was represented at such meeting, the said Zeckendorf being present in person and being furthermore represented by his attorney, also there in person.

At said meeting a resolution was offered, as follows:

"Resolved, That the agreement executed on May 20th, by the President and Secretary of the corporation with the Mammoth Copper Company and Albert Steinfeld, a copy of which is hereto annexed, be and the same hereby is, rescinded, and that the said agreement and resolution of the directors passed on said day may be declared null and void.

(Copy of said agreement of May 20, 1903, above set out, was attached to said resolution.)

The said resolution was unanimously passed, all of the stock of said corporation voting in favor thereof, the said Zeckendorf in person voting 250 shares of the stock of the said corporation in favor of the said resolution.

79 Said resolution so passed at said stockholders' meeting was not procured by false representation, misconduct or fraudulent practices, but it was manifest to the directors of said corporation and it is a fact that neither the said Zeckendorf nor any other stockholder present in voting for said resolution intended to advise, direct, consent or assent, to a rescission of any part of the said agreement of date May 20th, 1903, or of any other agreement or resolution, whereby the said Silver Bell Copper Company became, or might have become, the owner of the entire purchase price of the said properties conveyed to the Imperial Copper Company. All of said stockholders of said company understood that the entire controversy, then existing, was with respect alone to the right to the custody of the said purchase price (cash and notes) and that no question of ownership therein or thereof was involved or being raised.

Fifteenth. That there was no evidence whatever produced by either side, upon said first trial in this case, which tended to show that said L. Zeckendorf did not intend to "advise, direct, assent or consent to a rescission of any part of the said agreement of date May 20, 1903, or of any other agreement or resolution whereby the said
80 Silver Bell Copper Company became or might have become the owner of the entire purchase price of the said properties conveyed to the Imperial Copper Company; "or that any other stockholder did not intend to advise, direct, consent or assent to a rescission of any part of the said agreement of date May 20, 1903, or of any other agreement or resolution whereby the said Silver Bell Copper Company became or might have become the owner of the entire purchase price of said properties conveyed to the Imperial Copper Company; or which tended to show or prove that all or any of said

stockholders of said Silver Bell Copper Company understood that the entire controversy then existing was with respect alone to the right to the custody of the said purchase price (cash and notes), and that no question of ownership therein or thereof was involved or being raised, or that tended to show or prove either of said propositions.

Sixteenth. That on their appeal to the Supreme Court of the Territory said Albert Steinfeld, Curtis, Shelton and the Mammoth Copper Company assigned as error all of that part of this finding of the trial court which follows the words "fraudulent practices," as

81 error, upon the ground that it was not sustained by any evidence, and was in direct conflict with the undisputed evidence as to what was said and done by the parties thereto in relation to this matter.

Seventeenth. That upon the first trial of this case, there was a great deal of evidence before the court, as appears by the record on appeal to the Supreme Court of the Territory which was not considered by said last named court upon Steinfeld's assignment of errors as will hereinafter be shown and upon the question of the intent of the stockholders in voting to rescind the said agreement of May 20, 1903, at said stockholders' meeting of December 26, 1903, and which it is legally necessary and proper to consider in determining whether or not the aforesaid part of said finding of the trial court, which was assigned as error upon appeal, is supported by sufficient or any evidence, and which it is necessary and proper to consider before this or any other court would be justified in determining that any stockholder who was present at said stockholders' meeting of December 26, 1903, did not intend to advise, direct, assent or consent to the rescission of such agreement of date May 20, 1903, or of any other agreement or resolution, whereby the said Silver Bell Copper

82 Company became or might have become the owner of the entire purchase price of the said properties conveyed to the Imperial Copper Company, or that all or any of said stockholders of said company understood that the entire controversy then existing was with respect alone to the right to the custody of the said purchase price (cash and notes) and that no question of ownership therein or thereof, was involved or being raised, or that any or all of said stockholders understood either of these two last mentioned propositions.

Eighteenth. That the evidence bearing upon these questions which was introduced at said first trial, as appears by the record in this case and was carried on appeal to the Supreme Court of the Territory of Arizona, is as follows:

The Mammoth Copper Company was organized by Steinfeld for the purpose of taking over the title to the English group of mines in the event that he secured the same, and on May 16, 1900, the jumper's title of Francis and Volkert was purchased by the payment to them of \$2,500 cash out of his own personal funds, and the execution of a written agreement between them for the payment of the further sum of \$12,500.

83 On March 25, 1900, Steinfeld wrote to to Louis Zeckendorf as follows:

"March 25, 1900.

Case in the near future. You may give me your views on subject. There is one thing you are in error in, I believe. I do not think these people can afford to foreclose these bonds and that they will not do so.

Nielsens. We are now shut down there over two months, not on account of lack of ore, or prospect in mine, for this looks better than ever and bids fair to open into a very large property. Unfortunately the ore body drifted direct into the English claims and when we stopped we were within 20 feet of the end line of our claim. The securing of these claims became therefore imperative and a shut down was necessary to accomplish this. It further became necessary to get the Nielsens out on account of their not being able to harmonize with the best results of the works. The only bad feature about this is that the concern is heavily in debt to us. I can't just tell the amount, but it will be over \$30,000 exclusive of what is owing Uncle William, which is \$15,000. There is ample on hand and in sight to make good all claims against the property and if we can secure these claims, the property would undoubtedly sell for a large sum of money. I am in a fair

84 way to bring this about but should I fail in this respect, or to sell the same to a party Judge Barnes is connected with, and who have already examined the property and are to pay \$150,000 for same, then I shall start the property up again and make good the advances we are in. I can now see it was a mistake any way to close down before we were reimbursed but it cannot well be helped now. This is, of course, a great disappointment and really to my mind not necessary except through very bad management. We will, however, come out all right in the end. Of this I feel assured and we have to make the best we can out of it. What I want Uncle William to do is to forego for the time being his quarterly payments of \$2,500 which I think he certainly ought to do in view of the predicament he places us in. You can readily see that we must acquire this property and that this will happen is a foregone conclusion. He is perfectly safe and will get every dollar of his money in time, and I hope you can arrange this satisfactorily. I wrote him on this subject partially only and said that you would in time explain the matter farther. I furthermore want the right to terminate this contract with Nielsen M. & G. E. and take it up under name of another company should we so desire. We have got to get rid of Niel-

85 sen under all circumstances for many reasons that I will explain hereafter. Should we succeed in getting these English properties we have something we can sell for a big price and will stand investigations. You need have no fear of eventually getting our money out of same. There is ample in sight to do this, however, we should make an effort to get more than this which I believe can be secured.

On April 20, 1900, Albert Steinfeld wrote to Louis Zeckendorf as follows:

April 20, 1900.

r. Louis Zeckendorf, New York.

DEAR UNCLE: Yours of the 6th inst. I answered in part a few days ago. I am much pleased to know that you are now getting round again, and I have no doubt that you will soon be yourself again. It takes sometime to get over a sickness of this kind and you can feel thankful that you withstood same so well.

Regarding Azurite, a trade is again on hand, which I believe will go through, by which we will get our money in a few days. Mr. Lyle, the associate of Mr. Hill, examined the property for his company sometime ago. This report was favorable. If they could come to same on favorable terms, the Globe Min. Exp. Co. would take same up. This, however, would mean a long winded affair.

I figure in any event we are perfectly safe for the amount they owe and I do not doubt that we will get out of same in

short time satisfactorily. Reg. Ray shares, you may be right. This is undoubtedly a very large property and ought to be a very profitable

one. I am not satisfied with their arrangement, however, and recognize the absolute necessity of a railroad to successfully work the property. This undoubtedly will come in time. Mr. Hill, who recently

interviewed C. P. Huntington assures me that the railroad will come within a year. Mr. Dexter returned to London. While in New York he sold considerable of the Ray debentures there and especially

large block to Thompsons, who run the Ref. works, who offered to take all the issue which they, however, won't sell to anyone now.

Mr. Hill tells me all this. I have begun on a trade with Hill for Silver Bell properties, which will be a happy solution of this whole matter if it goes through. I am expecting him any day to

fully close same up. The terms are these: He is to purchase the English properties on which he now has an option for the London

companies. He is to settle the several complications of title to same by securing an option from the Red Rock and other groups and

an assignment from Nielsen of his contract with these companies and their interest in same; to do three months' development work on Old Boot, at end of which time he is to

take the smelter. He obligates himself to pay \$17,500 being past and to become within eighteen months in all as follows: \$17,500

paid and then \$50,000 from the net proceeds smelter, deducting the cost of smelting and extending the ore all products to be

turned over to us; after having paid \$50,000 he is to repay any development work paid out on property, and after that all proceeds

are turned over to us. Any outside ores he may smelt by paying reasonable smelt charges. In event he does not pay or operate

continuously he loses all and any properties he acquires by purchase or otherwise reverts to us. In addition we got 10 per cent of

net profits of any sale that may be made hereafter. If he signs a contract we are perfectly safe to get all the products of the

property to at least \$67,500.00 and any property he acquires is for our benefit. I expect him in any day and the matter may then be

ended up. * * *

On May 16, 1900, Albert Steinfeld purchased the jumper's title

of Francis and Volkert to the English group of mines, upon the conditions and for the consideration set forth in an agreement
88 executed between them on the same day, which is in the words and figures following, to wit:

"This agreement, in triplicate, made this 16th day of May, 1900, between Albert Steinfeld as the first party and Margaret Francis and Julius Volkert, as second parties:

Witnesseth: That for and in consideration of the conveyance by said second parties to the Mammoth Copper Company, a corporation, of the following named mining claims, situate in the Silver Bell Mining District, Pima County, Territory of Arizona, to-wit: Murray, Emerald, Prospector, Hamilton, Silver Bell, Florence, Southern Beauty, Union, Comet, Page, Imperial, Yankee, Mollie, Anita, Herbert and Black Daisy, and two mill sites located in said district and named Silver Bell and Hamilton, and for the further consideration of the agreement of said second parties to assign, and they do hereby assign, transfer and set over and sell unto said first party all claims, demands and dues they may now have against and from the Tucson Mining and Smelting Company, a corporation, unto said first party, said first party hereby agrees:

First. That on the execution hereof he will pay to said second parties \$1,875, and that so soon as the interest of the infant children of said Francis in and to those mining claims
89 conveyed as aforesaid, and in which they are interested, shall be duly conveyed to said Mammoth Copper Company, which said Francis agrees to cause to be done as soon as may be, then first party shall pay to said second party, the further sum of \$625.

Second. The parties hereto have been told that the Tucson Mining and Smelting Company, a British corporation, claims to have an interest in or claim to certain of said mining claims. Therefore the said first party will either by suit or claims or compromise, use his best endeavor to defeat any such claim or claims by resisting the same in the courts, or by compromising and satisfying the same as to him shall seem best; and in and about such litigation or compromise, said second parties will lend said first party all aid in their power.

Third. That said first party will cause the assessment work needful, to be done in a proper manner and in apt time on each and all of said mining claims, and will pay therefor in full, provided, however, that said first party shall have the right to recover, or cause to be recovered to said second parties and to thereby vest in them any of said mining claims if the same shall be done on or before the
90 first day of November of each year, and, by said time, he shall also cause such deed or deeds to be recorded in the county recorder's office of said county by said time, then he shall be relieved from doing or causing to be done any assessment work on the claims reconveyed as aforesaid for the year in which they are reconveyed as aforesaid for the year in which they are reconveyed and thereafter.

Fourth. That certain of said claims have been jumped, and the jumpers have pretended to locate the claims so jumped as their own,

and, in the future, other of said claims may be jumped. Therefore, said first party will, either by suit or suits or by compromise, use his best endeavor to dispossess said jumpers, and to cause their said pretended locations to be annulled, and to that end if he cannot compromise with them on such terms as shall seem wise to him, he will cause a suit or suits to be instituted and prosecuted with diligence to final judgment, for the purpose aforesaid, and will bring to the aid of said prosecution all due and proper means to win the same, and said second parties agree that they will lend to said first party in the prosecution thereof, all aid that is in their power to give.

Fifth. That said first party will do whatever he can to sell said mining claims, and that, on the sale thereof, or on the sale of any one or more thereof, then and in that event, he will
91 and shall at once pay to said second parties the further sum of \$12,500; but should he fail to make such sale by the first day of November, 1903, then he shall, if no sale be pending at that time, and if pending on its being lost, if demand therefor be first made and he be paid the amount of money that he has actually advanced and disbursed in and about getting and maintaining the title in and to said mining claims, and in and to each and all thereof, convey unto the order of said second parties all of said mining claims not theretofore conveyed to them as aforesaid.

In witness whereof, said parties have hereunto set their hands on this day and year first hereinabove written.

(Signed)

ALBERT STEINFELD.
MARGARET FRANCIS.
JULIUS H. VOLKERT."

On June 29, 1900, Albert Steinfeld acquired the 300 shares of stock of Carl S. Nielsen and Mary Nielsen, his wife, in the Nielsen Mining and Smelting Company, upon the conditions, and for the consideration mentioned in their certain agreement of that date, which is in words and figures as follows:

This agreement made this 29th day of June, 1900, between Albert Steinfeld and the Nielsen Mining and Smelting Company, a
92 corporation organized under the laws of the territory of Arizona, parties of the first part, and Carl S. Nielsen and Mary Nielsen, his wife, the parties of the second part:

Witnesseth, that the said parties of the first part in consideration of the transfer by said Carl S. Nielsen to Albert Steinfeld of three hundred shares of the capital stock of the Nielsen Mining and Smelting Company, and in consideration of the said parties of the second part executing their deed of quit claim and release of their interest in and to certain mining claims as fully appear from certain quit claim deeds executed by said parties of the second part and one L. B. Lewis to Albert Steinfeld, and in further consideration of the sum of one dollar (\$1) by said parties of the second part in hand paid to the said parties of the first part, the receipt whereof is hereby acknowledged, do hereby agree that they will pay unto the said parties of the second part the sum of ten thousand dollars (\$10,000) lawful money of the United States, as soon as the said Nielsen Min-

ing and Smelting Company will consummate a sale of its mining properties, which are situate in the Silver Bell Mining District, Pima County, Arizona Territory, such sum to be paid within thirty (30) days after any such sale is completed.

93 Said parties of the first part further agree that in the event said Nielsen Mining and Smelting Company, commence active operation in the said Silver Bell Mining District, and work, ship or reduce ores, that then and in that event the net profits which may arise to said company from its said working, shipping and operations, shall be applied first to the payment of the debts of said company; second after said debts are paid, said net profits up to the amount of ten thousand dollars (\$10,000) shall be paid to the said parties of the second part, and upon full payment of said sum of ten thousand dollars (\$10,000) out of said profits, the parties of the first part hereto shall be released and relieved from any obligation to pay said parties of the second part a like sum of ten thousand dollars (\$10,000), or any part thereof in the event said company consummates or completes a sale of its properties as hereinbefore agreed; this is to say, in no event shall said parties of the second part be paid more than said sum of ten thousand dollars (\$10,000).

In Witness Whereof, the parties hereto have hereunto placed their hands the day and year first above written in triplicate.

(Signed) ALBERT STEINFELD.
NIELSEN MINING AND SMELTING CO.,
94 By J. N. CURTIS, *President*.
MARY NIELSEN.
CARL S. NIELSEN.

TUCSON, June 10, 1900.

Steinfeld to Zeckendorf:

I received your telegram about examination and sale of Old Boot. I agree with you that we should not have got involved in this enterprise, and there is no reason nor necessity for doing so but we are in it now and we will get out of it all right. I think you may rest assured. I am in hope that by the end of this year we will be in much better condition.

TUCSON, June 29th, 1900.

Same to Same:

I have been out to the Old Boot and looked over the mine generally and concluded to send out a surveyor at once to survey the underground works and show us just where we are and how to locate our ore bodies. After ascertaining this information we will at once start development work and I believe in sixty days we can be ready to start the furnaces again, and I hope make us even on all advances on the property, and, in the meantime, if there is a favorable chance to sell to do so. I have promised Judge Barnes' people who have already examined the property when it was in operation the first chance of a sale.

95 I have about concluded to make a trip to London and the Continent about the middle of August. I want to try to do

something with Ray shares while I am there, and possibly make some good connections with some of our other properties. I do not think it will take me much longer than my usual vacation, and I think I will like the change, and especially dear Bettina, who will enjoy the exposition.

TUCSON, July 7, 1900.

Steinfeld to Zeckendorf:

Judge Barnes is expecting some one out who will negotiate for option on Old Boot. I hope to get away from here about the 20th of August, leaving for San Francisco, and arrange to go on my European trip about the 15th or 20th. I hope that nothing will interfere with same, as I look forward to same with great pleasure.

July 18th, 1900.

Same to Same:

The only serious mistake he (meaning Hugo) made last fall was in allowing the Old Boot and Azurite to get too deep into us. I am now waiting to meet the parties who are expected here next Sunday to negotiate for the Old Boot. My price to them is \$150,000, ten per cent cash and balance in two, four, eight and twelve months.

96

July 25th, 1900.

Same to Same:

The parties who were to negotiate for the Old Boot came but I cannot come to any agreement as they wanted to tie same up without paying anything down. I told them whenever they are prepared to go into any reasonable contract and pay down ten per cent of purchase price, we may sell, but do not hold the price open. I am in hopes that within sixty days we can start furnaces and repay ourselves for all advances.

ALBERT STEINFELD testified at the first trial as follows:

"I completed the transaction with the English people in November. That was the principal purpose, my prime purpose, in going (to Europe). I returned in December, 1900. When I returned the mine was in operation and until December, 1901, or in the first part of January, 1902. It was closed down between that time and the purchase from the Nielsens before I went to Europe."

Upon the second trial of this case, the District Court found "that on the 14th day of January, 1901, the name of said corporation (Nielsen Mining and Smelting Company) was regularly and duly changed to the 'Silver Bell Copper Company.'"

97 That on the second trial of this case, the District Court found as follows:

"The said Steinfeld in purchasing the said English group of mines from the said Francis and Volkert and from the said English owners, did not purchase the same with the then intent that thereby they should become and be the properties of the Silver Bell Copper Company, but at the times of said purchases the said Steinfeld intended to take the properties as his own, but with purpose to

offer to the said Silver Bell Copper Company an opportunity to take said mines and said properties upon the said Silver Bell Copper Company reimbursing him for the outlays and expenditures which he would be and had been put to in acquiring the same, and said Steinfeld expected that the said Silver Bell Copper Company would take over the said properties, the said Steinfeld intending on his part that in the event the said corporation did not take over the said properties and so reimburse him he would keep said properties for and as his own."

On the second trial of this case, the District Court also found, as follows:

That when said Steinfeld returned from Europe after concluding the purchase of the English titles to said English group of mines, he advised and told plaintiff that he had purchased the same.

98 Upon the second trial of this case, the District Court also found:

"That Albert Steinfeld did not at any time prior to the purchase from the English owners of their title to the English group of mines make any direct or express promise or representation to the Nielsen Mining and Smelting Company, or the Silver Bell Copper Company, or to any officer or director of said company, that he would purchase as agent or representative of said company or otherwise, the Francis and Volkert titles to the English group of mines, or the title of the English owners to the English group of mines for the use or benefit of the said company."

October 6, 1901.

Steinfeld to Zeckendorf:

My final offer to Davis people was \$50,000 cash—\$100,000 sixty days and \$150,000 in six, twelve and eighteen months with interest at 6 per cent. They have made a wonderful furnace run for September—nine cars of matte. The mine is kept in condition to show and sell. There probably is a big mine there, but we cannot chance any more than we have, which has exceeded anything that I ever contemplated by a great deal and I am much worried over same. On September 1st they owed us about \$90,000. The production in

September will probably go \$40,000 and Curtis claims on
99 hand at dumps ores that will net to us \$30,000 to \$35,000. We must sell and get out of this.

TUCSON TO NEW YORK, May 30, 1902.

Same to Same:

Mr. Johnson returned from Silver Bell much pleased, but unwilling to submit same at exceeding \$375,000. I have given him permission to submit same on this basis. Have given him until the 15th of June. I only hope they may take it. There is too much risk about a property of this kind.

November 4, 1901.

Curtis to Zeckendorf:

The Old Boot still all right. We are now on the Imperial Mine (one of the Silver Bell purchase) which is proving to be very good;

also a fine showing on the Southern Beauty (another of the Silver Bell purchase). These two mines are liable to change matters very much and raise the selling price probably double what we were asking. I shall push the work all I can on these mines, first for the carbonate ore they are producing, and second, to prove their market value.

November 17, 1901.

Curtis to Zeckendorf:

The Old Boot mine about the same and new finds on the Imperial and Southern Beauty. I am pushing all I can to get the ground opened up to show and prove results and value. This will take time, but so far everything is very satisfactory and we are getting enough ore from the new work to more than pay the expense of opening up.

February 19, 1901.

Zeckendorf to Steinfeld:

I have been several days at Silver Bell to acquaint myself with our interests there. I notice a good many improvements since my last visit there and everything looks prosperous. I did not go down into the mine but through maps have a fair idea, how it must appear, which is rather in a doubtful condition. I feel nervous about our enormous investment and everything depends on the developments of the ore body.

June 17, 1901.

Zeckendorf to Steinfeld:

I am now receiving a regular report from the Silver Bell which is very convenient for me. I have named the price for the purchase Silver Bell \$500,000.

September 3, 1901.

Zeckendorf to Steinfeld:

The Old Boot has been offered for sale by two other parties one with which Mr. Wemple is connected. I hope you will be able to make a deal as this is too heavy load for us to carry.

December 4th, 1901.

Zeckendorf to Curtis:

I have received your favor of December 3. I have no doubt if you had a more suitable plant the results would be more satisfactory. At the same time we have to take into consideration the large amount of indebtedness at present due to our firm which I desire to have reduced instead of increased.

December 22, 1899.

Zeckendorf to Steinfeld:

Referring to my letters of the 20th inst. and have received yours of 15th, I cannot see how you can get involved in mines to a larger amount than you have security. I am anxious to know how we stand with Old Boot. We had a terrible panic here this week and matters are shaky yet.

October 30th, 1899.

Zeckendorf to Albert Steinfeld:

Referring to my letters 20th inst. I have received yours 20th. I

hope you will not permit this account to increase. It is really strange that we always have some elephant to carry.

102

April 25th, 1900.

Zeckendorf to Steinfeld:

I was surprised and no doubt you also to see the large amount we owe and the enormous amount in the books. The way our business is doing must be owing to the fact how our books are kept.

August 1, 1900.

Zeckendorf to Steinfeld:

Whenever the Old Boot is in good shape to be shown let me know and I will notify my party. I have to have so much money tied up in so many enterprises which is actually a dead capital.

June 2, 1900.

Zeckendorf to Steinfeld:

I hope the Old Boot will turn out satisfactory yet. Such investments to tie up such large amounts of money does not pay us and I notice you keep us very short in money while we ought to be flush. We have too much outstanding.

SELIM FRANKLIN testified at the trial as follows:

"There was a great deal of conversation between Steinfeld and Curtis and myself as to what indemnity Steinfeld was to receive for guaranteeing the titles. I said that Mr. Steinfeld had assumed a great big obligation and heavy responsibility in guaranteeing these titles. I said it was nothing more than right and proper that the purchase price, after paying the necessary debts, should remain in the hands of Mr. Steinfeld, as trustee, to indemnify him against loss in the event the titles should be taken, or that damages should arise by virtue of any of these titles not being good; in other words, the money should remain in Mr. Steinfeld's hands as trustee to prevent loss, until the expiration of the guarantee, and I strongly urged that *they* should be done because I said Mr. Steinfeld was fully entitled to it for the responsibility he was assuming. It was to cover that, that I drew this long agreement Mr. Steinfeld also wanted this done and Mr. Curtis consented to it. I drew up this agreement on the 20th of May, 1903. It was between the Silver Bell Copper Company and the Mammoth Copper Company.

Mr. HENEY:

Q. Is this the agreement which was executed?

A. Yes, sir.

The WITNESS: Now, I wish to state that I devoted two or three days of very hard work to drawing up and drafting this agreement, covering the same proposition, according to my own views of the matter. I have the agreement here; it was not accepted.

104 Mr. HERRING: How many pages, typewritten pages, were there of that agreement or copy?

A. There are nine typewritten pages, and appended to it are copies of other agreements. It was submitted to Mr. Steinfeld and Mr. Curtis. Mr. Steinfeld objected to it, as being too long and too elaborate. Thereupon I did my best to draw up something simpler. That is what I drew myself. It is a part of the work I did.

Q. And the appendix?

A. Those papers are a part of the work. They are a copy of the guarantee agreement."

ALBERT STEINFELD, testified at the trial, as follows:

While I was negotiating with Mr. Gage prior to May 20th, some things was said about guaranteeing the title to these properties. We had a number of talks about that; they wanted a condition which I would not agree to, something of a guarantee, which had no limit and they would not do anything unless I would guarantee the title, that is the way it started. When I say "unless I would guarantee the title" I mean by that, personally. Mr. Gage told me that he would not buy this property at all unless I did guarantee these titles personally, at any rate, what they insisted upon first was

105 something I would not agree to; they wanted it to have no limit of time. We finally agreed upon this contract which is in evidence here. During that time we had quite a number of conversations with them on the subject. The conferences were between Mr. Gage, Mr. Goodrich and Mr. Franklin was also present. Mr. Gage first said that he was going to close this deal on the 20th of May, I think about ten or twelve days previous to that, and the conferences about the title proceeded. The definite terms of the final agreement or guarantee as it is in evidence were agreed upon prior to May 20th, 1903. They submitted the forms of different contracts, and finally this particular guarantee agreement was agreed upon between Mr. Franklin, Mr. Curtis and Mr. Shelton and myself had a good many conferences; in fact, we had meetings and conferences during that entire week, and for ten days prior to that, the question came up as to what disposition to make, to what I was to have to protect myself under the obligation which I had assumed. I had agreed to renew this offer of mine which the company had an option to purchase. This is the offer of mine dated July 15th, that is in evidence here.

We agreed between ourselves that I should be fully protected, and I impressed that very strongly upon Mr. Franklin. I realized

106 that I was taking very great obligations upon me and it might cost me a great deal of money, and I insisted upon the fullest protection.

I am talking about the agreement protecting me under that guarantee and the various obligations which I had assumed and Franklin then had up. Prior to that something was said about the distribution of the purchase price, about the adjustment of the purchase price. That was also in these conferences, that resulted from these various conferences, that contract between the Mammoth Copper

Company and the Silver Bell Company and myself of which this purchase was the result.

Mr. Franklin claimed up to that moment that I was a trustee for this company with respect to the 300 shares of stock and these properties. He said so during these conferences, I believed Mr. Franklin's statement with reference to the character of this ownership; most assuredly I did. And in my action and in the signing of that agreement I relied upon Mr. Franklin's statements; he had been my attorney for years. I consulted no one else.

I cannot state exactly when I first saw that long agreement as we call it, which was never executed, but was prepared by Mr. Franklin and which is now in evidence. I cannot state exactly what date it was, but all these papers passed within a few days, at about
107 the same time with reference to the 20th day of May, I first saw this long paper just a short time before, probably the day before, or a short time before any way, before the 20th of May, I read that agreement. That agreement embodied all the oral arrangement that had been made by all of us in these conferences. It covered it all, I believe. My only objection was that it was a very lengthy document and I wanted it shortened. I wanted the substance of it condensed. Franklin said to me with reference to the shorter contract that the contract expressed the same thing as the longer one. He informed me that it was substantially the same as the longer one, only it was in condensed form. Mr. Franklin was not my personal attorney in that transaction as against the Silver Bell Copper Company; he was the Silver Bell Copper Company's attorney and he was also my attorney.

As I have stated, he was my general attorney; he represented me in everything. He was not under any general retainer from me personally. By my attorney, I mean he was the attorney to whom I would go if I wanted any advice in my personal matters. I always consulted him.

Q. Did he during any of these conversations state whom he claimed to be representing in that transaction?

A. I don't remember as that question ever came up.

108 Q. I will call your attention to page 43 of the minute book of the Silver Bell Copper Company, purporting to be the minutes of a board of directors' meeting held on the 20th day of May, 1903, and I call your attention particularly to these minutes on page 46; with lines drawn through them. Do you know whether these minutes up to and including the point stricken out, were prepared before or after the 20th of May?

A. Why, my recollection is that they were prepared before.

I remember that I saw them at or about the time that I saw this long contract. I told Franklin that it covered the agreement fully and my objection to it was that it was too voluminous and long.

Mr. Franklin presented me the second agreement, the one that is in evidence on the 20th. I think that is the day it was executed. If I remember right, it was executed before the payment of the money and notes by the Imperial Copper Company. I was very particular to have protection in this matter, and I impressed that

fact upon Mr. Franklin prior to the delivery of the money and the note and the escrow agreement to the Imperial Copper Company. I discussed the terms of this agreement with Mr. Curtis and Mr. Shelton. I insisted that my position as I had outlined it first was the same as I told Mr. Franklin. We discussed and I insisted to them that I should have the fullest protection. They said that I ought to be fully protected and that they were perfectly willing that I should be, in respect to these guarantees and these obligations I had assumed.

Prior to the delivery of the note and the money Mr. Curtis, Mr. Shelton and myself had a number of meetings at which Mr. Curtis and Mr. Franklin and myself were present. They were at Mr. Franklin's office and sometimes at the office of L. Zeckendorf and Company and these matters were gone over very thoroughly and very fully and I insisted and claimed that I wanted the fullest protection in assuming these responsibilities and these various obligations of mine, and the result of that was this agreement. It was fully agreed upon between us. These conversations took place before I turned the deeds over to the Imperial Copper Company and put them in escrow. Of course, I would not have consented under any circumstances to passing the title to them unless I was protected. I would not have signed the deeds unless I had had full protection. I realized fully what I was doing."

TUCSON, May 20, 1903.

Steinfeld to Zeckendorf:

I wrote you this morning that Old Boot deal was completed and we received \$115,000 in a check on Phoenix bank this day.

I also hold four notes of the Imperial Copper Company. Both the money and the notes have been turned over to me as the treasurer of the Silver Bell Copper Company, and as such I shall hold them and also as security for the fulfillment of certain personal guarantees I had to give to the purchasers as to the validity of titles, etc., and copy of all these papers I will send you tomorrow.

MAY 22, 1903.

Mr. Louis Zeckendorf, 320 Broadway, New York.

DEAR UNCLE: I have been very busy both yesterday and today. Could not get you the copies of agreements entered into, but herewith send you the original of the two contracts, and ask that you return them to me; and if you could you may have copies made thereof. We received \$115,000.00 which has been distributed as follows:

Teleg. transfer, \$75,000, less 617 returned.....	\$74,383.00
Paid N. O. Murphy for his Com. contract of \$25,000..	22,500.00
Paid amounts due Mammoth Copper Co. and A. Steinfeld	18,117.00
	<hr/>
	\$115,000.00

The Murphy commission was agreed to be paid in full on first payment, but the reading of the contract was that it referred to partial payments, though the Gage people paid \$12,500 cash, their portion of same. At any rate I settled same by discounting it \$2,500.00 which he agreed to and we are that much ahead. There is still due Francis Volkert contract, \$12,500 when sale is consummated and to Mrs. Nielsen \$15,000 which closes up all the debts except what is owing to the firm. I have rendered some very valuable services for this company for which I am entitled to compensation which we will adjust later; on the whole I think we come out pretty well. I expect Franklin will have.

111

MAY 28, 1903.

Louis Zeckendorf to Albert Steinfeld:

As far as your guarantee is concerned I am perfectly willing to indemnify you to the amount you are entitled to, and there will be no cause to deprive me of any dividends on account of future payments. I am surprised I see in your statement pay to yourself and Mammoth Copper Company \$18,117 cash, what does this mean? It is the first time that I ever knew there was such company, as you have never said a word about it. How do you arrive at such figures? You surely cannot deal with yourself. You mean that those prospect holes are worth that amount? On the same principle you could have taken any amount and credited the Silver Bell with anything you pleased. I cannot see how Mr. Curtis can locate such mines while either employed by our firm or the Silver Bell. Such locations justly belong to the Silver Bell. I hope you can explain this matter satisfactorily to me. You cannot ignore me in such affair in which I am interested. You speak of due Francis & Volkert \$12,500. This is entirely new to me. You always said Gov. Murphy would get \$25,000 and in yours of the 4th ult. you said that you arranged that Gage people should pay off the * * *

Nothing about Volkert; you also state the price gives us practically \$490,000 net and nothing said about the Mammoth Company.

You also say you are entitled to compensation for valuable services rendered. Did I ever dream of rendering a bill for untold labor I rendered in the Copper Queen, Ray, Copper King? Can you compare your services with mine? When I called on hundreds of people to buy stock—I never heard of such thing that one partner wants to charge the other for labor performed.

Regarding Franklin's bill, you should have made your agreement beforehand, especially as you know him. I would like very much to pay your local indebtedness and you cannot draw on me on account of the \$75,000 as most of it is disposed of, as you know. Send me a statement due us by the Silver Bell.

JUNE 4th, 1903.

Mr. Louis Zeckendorf, New York.

DEAR UNCLE: Both yours of the 20th and 28th inst. at hand. I think we may well congratulate ourselves on the successful termi-

nation of the negotiations by which we got rid of the Silver Bell properties, which have been such a cumbersome and heavy
 113 burden for us to carry. I only hope that nothing may arise that will prevent the final consummation of the transaction, when we may all feel well satisfied. You evidently do not understand the nature of the various properties transferred, though I thought this was at various times explained to you. I enclose herewith a Memo. showing the record title of the 49 claims embraced in the sale. I have divided them into four groups. No. 1 is the original Mammoth, or commonly known as Old Boot bought from Uncle William. No. 2 consisting of twenty-nine claims bought by Curtis and by him deeded to Silver Bell Company. These claims cost nothing except the assessment work and are of no material value except their close proximity to the other properties. The No. 2 claims, Accident and Black Rock was bought by the Silver Bell Company, for a few hundred dollars, one being required as an iron mine and the other was the Elliott claim relocated. The No. 3 group consisting of one and three total 17 claims, were acquired by the Mammoth Copper Company, a company organized and controlled by me, and was for the purpose of acquiring what we always called the English claims. The thirteen claims were jumped by

114 Volkert and Francis, but I never considered their title to same good, or to be depended upon to rest with, the Black Daisy, Herbert, Mollie and Anita, were however, valid locations of Volkert, or Volkert and Klug, and were considered of value on account of their locations. At the time these purchases were made by the Mammoth Copper Company, the Nielsens were still owners of their interest in the Nielsen Mining and Smelting Company and as you know I subsequently purchased the interest of the Nielsens in the Nielsen M. & S. Co., now known as the Silver Bell Copper Company, as you know we had been trying for a long time to acquire these properties now held by the Mammoth Copper Company and had made many efforts in various directions to secure the same but without avail. It was necessary, however, to procure the original title from the English people, which in a measure I tried to secure by correspondence, through various sources but was only able to consummate a transfer of the property when I met the principals in Europe. Without these properties the value of our properties would have been very much reduced. In fact, I don't know if a sale could have been made at all to any syndicate without including same. Our best showing and values are on the properties, and

115 if you will read the Johnson report you will note that he estimates the tonnage of the Old Boot at 50,000 tons, whereas on Southern Beauty and other of these groups 250,000 tons. Owing to the Silver Bell Copper Company having no means to avail themselves of this purchase, and owing further to the fact that our firm was already very largely involved with the Silver Bell Copper Company much more than had at any time been contemplated. I undertook to advance the money to carry out these purchases personally and offered to turn them over to the Silver Bell Copper Company in writing, whenever I should be reimbursed for the moneys

I had expended in acquiring same. The amount of money the company has now paid me and the Mammoth Copper Company is the actual amount which I have disbursed in connection therewith with interest on such disbursements at rate of 12 per cent per annum. In this is included the \$2,000 I paid Nielsens and I herewith enclose a condensed statement thereof. I am obligated to pay \$10,000 to the Nielsens when we sell the property, and also to Francis & Volkert on November 1, 1903, \$12,500 which covers all obligations in connection with this purchase. In no way have I aimed to either charge one dollar more than was actually disbursed in these matters, nor to have personally availed myself of
116 acquiring the benefit thereof. The Silver Bell Company have always claimed ownership of these particular mines under their option of mine to purchase same. I considered them a good purchase at the time and wanted the company to have the benefit thereof, realizing however, that in all this I was assuming all the risk of holding the properties with no share of any profits in the sale thereof and not even an obligation on the part of the Silver Bell Copper Company to reimburse me, unless they so chose. I consider that the main value of this sale is centered on these mines, and I think every mining engineer will agree with this, notwithstanding this, I turned them over to the company upon the actual amount of my disbursements plus interest at 12 per cent and they assume in addition the payment I am obligated to make to the Nielsens and Francis and Volkert. You can therefore see how unjust and how unreasonable your insinuations are in inferring that I have aimed in any manner whatsoever to take advantage of either you or the company. I justly think that I am entitled to a reasonable compensation for the valuable services that I have performed, not alone in negotiating the purchase of these properties at a price
117 and upon terms so favorable but also in the services I have rendered in the sale just made, all of which has * * * to the benefit of this company. I consider that I have negotiated a most favorable sale, and I don't think there will be any doubt but that every payment will be met at maturity. I have done so at an expenditure of a commission of \$10,000, paid to Mr. Murphy, the other \$12,500 being paid by the purchasers, when a commission of 10 per cent would have been considered reasonable, and in addition to this we get interest on our money, which makes quite a sum. The matter of my services, however, can be left for the future. I do not want one dollar from you or this company that I am not justly entitled to and fully earned, nor do I want to detain your money one day longer than necessary. An indemnity holding me harmless from all the obligations I have personally assumed is all that will be asked to distribute the same. I want you to appreciate what I have done and accomplished in all these matters and not jump at conclusions as you have. You must remember that this is not a co-partnership, but a corporation. I have never reproached you for anything you have ever done in mining business or otherwise. The value of services, however, is generally reasoned by their importance, and above all, by the results that they

accomplish. I must say that in all this Mr. Curtis has done
118 all that any living soul could do either to put the property
in condition to reimburse us and particularly to make the
sale, and while he will get a handsome sum out of this, he has justly
earned every dollar of it and am glad it has turned out so well.
The plans of the new company are such that we are bound to get
our money before they really know what they have, though I do
believe they will have a good property in time, but they have yet to
make it. I send you a Phoenix paper and you will see why they
will have to take this property. The lawyers seemed to think there
was no obligations in the carrying out the American Metal Com-
pany contract, that it had expired and probably was not further
thought of by them. In any event, I don't think there will be any
trouble about this.

Regarding Franklin bill. He was our regular attorney and I
did not think nor believe it necessary to do so. I was more than
surprised to have him make a claim of \$50,000 for his service but
said he could accept \$25,000. I think both sums ridiculous, and am
satisfied he will never get same. I thought we ought to have paid
him \$2,500 to \$5,000. I believe it probably can be settled for that

latter figure. A certain Judge Burnett of Phoenix, with
119 whom I had some correspondence about a sale of property,
claims a commission, but I don't think there is anything in
his claim. Alfred Donau claims a commission for having brought
Gov. Murphy to us, which he did, and I know done considerable
in getting the governor started on same. I have agreed to allow him
\$2,500 out of the next payment for this services, and if it had been
a stranger he would get a great deal more. He made several trips
to Phoenix at his own expense, and all correspondence with governor
was through him.

I will send you a statement of Silver Bell and answer other parts
of your letter tomorrow. With much love to all.

Your Sincere Nephew,

ALBERT.

JUNE 5, 1903.

Steinfeld to Zeckendorf:

I refer to mine of yesterday. I enclose you herewith statement of
how we stand with Silver Bell Copper Company. The item of in-
terest is pending. I shall draw to pay note Bank of California
\$5,000 today. Believe you will have ample funds to meet same
and would like to take up \$5,000 in which local bank. I also
enclose herewith 250 shares of Silver Bell Copper Company. I have
divided up the certificates of 529 shares due to the firm, and in lieu
thereof issued 250 shares to you, 249 shares to me and one
120 share to R. K. Shelton, which is to be mine and 30 shares
to me as trustee for J. W. Zeckendorf. The sale of the
property now being made, it is better that the stock should be
divided up.

JUNE 17, 1903.

Steinfeld to Zeckendorf:

After writing you last, Franklin has brought suit on his agreement as per enclosed copy of complaint. Fearing that he would attach or garnishee the notes on the 11th inst. I sent them to the Bank of California with the instructions to pay the proceeds to the stockholders of the Silver Bell Copper Company after first depositing to my credit \$100,000 to meet all pending obligations. Whatever sum may remain in my hands in excess of meeting such obligations will also be divided in proportion to each share holder. I believe therefore that I have placed both the notes and proceeds of same beyond his reach. I consulted Rochester Ford as to whether this could be done legally and he approved the same. Franklin is entirely wrong and can be so proven in most of the claims of services referred to. In no way was he instrumental in securing the English properties. He was representing Hill and the Globe Minerals Exploration Company and secured Judge Wright in securing the Francis and Volkert title.

121

June 18, 1903.

Zeckendorf to Steinfeld:

I have received both your favors of the 4th and 5th insts. with enclosures. I'd like to know how I could understand the transaction of the Mammoth Copper Company without his telling me a word about it although the opportunity has offered itself various times to explain matters to me.

Two years ago I ascertained through the Nielsens the deal of 300 shares of Silver Bell stock afterwards admitted to be correct. You told me that besides you promised to pay \$10,000; you paid him \$2,000 cash down. I said then that inasmuch as the stock was purchased for the interest of the Silver Bell our firm should refund you the money. You said, never mind, the concern owes our firm enough; and I remarked that this was very kind of you.

After making inquiries what had become of these 300 shares purchased, no one could give me any satisfactory explanation. Mr. Curtis told me last year that he did not know that he ever signed any agreement between the Silver Bell and the Nielsens, and Mr. Cooper could not remember that he had taken this agreement to Silver Bell and made Nielsen sign it and acknowledge the same before him as notary, and of the other deal you explain now

122 you did not tell me a single word. Now, if we relate this transaction to any intelligent person what conclusion must he come to? You purchased these mines of Volkert and others for your interest and speculation with the expectation to develop another Old Boot and as these expectations were not realized the Silver Bell had to reimburse you. I do not doubt you meant well, but why I was kept in ignorance of this affair puzzles me.

June 26, 1903.

Zeckendorf to Steinfeld:

I have received yours of the 17th inst. covering the complaint of

Franklin which was no surprise to me. A regular blackmailing affair. You made him and now he goes back on you.

June 30, 1903.

Mr. Louis Zeckendorf, 320 Broadway, New York.

DEAR UNCLE: Yours of the 18th inst. at hand. The reason that I never went into details of these mining properties was that I did not want to burden your mind with the fact of the large disbursements I personally made, and the large personal obligations I assumed in carrying of same out. After our sad experience with the
 123 Ray, I never expected the firm to ever get involved in this way again. When the original Old Boot was first leased to Nielsen, we believed the property would take care of itself and the advances made him were based on ore values and smelter product which was not realized. When we subsequently organized the Nielsen M. and G. Co., it was to protect these advances. No one will or can ever know the worry and anxiety I went through in the various stages of this operation, and it is needless to refer to same, except to say that it was never contemplated that we should ever get involved to such an extent as we did. I involved my personal money and undertook and assumed obligations which this company had the option to take up and repay me my disbursements. While I at all times recognized the value of these properties, either by themselves or otherwise, I never aimed at any time to personally avail myself of same. I assumed all the risk and the company got all the profits. This same applies to the purchase of the Nielsen stock and interest. I used my personal money in its purchase and personally assumed the obligation of its first payment. You have a copy of this contract which speaks for itself. I don't think you will doubt for a
 124 moment that I could have purchased and secured all this without considering this company, for you must not forget that this was not a copartnership but an incorporated company in which our firm were simply shareholders and there is nothing that could have prevented me from maintaining an independent attitude. I assumed however, to have this company avail themselves of my personal effort and personal investments and obligations I have assumed without any profit to me. I do expect, however, that this company shall pay me for these services, as also for the successful and unprecedented negotiations which ended in the consummation of a sale of this property upon terms and at an expense rarely heard of in a deal of this magnitude. This claim I don't make to you, but to the Silver Bell Copper Company, a corporation in which our men were simply stockholders. This company has had all the benefits of my efforts has made a handsome profit out of the same and can well afford to pay me what I don't think there can be any question about that I am entitled. I deny that you offered to return me the money which I had paid the Nielsens. You did say that I was very considerate making such advances personally for this company. * * *

Will be no trouble about that metal contract. I am satisfied that will all be arranged satisfactorily. Probabilities are the metal company will pay no more attention to me.

Regarding Franklin, I have already written you. The three hundred shares of stock formerly belonging to C. R. Nielsen stand in my name as trustee, and I decline to divide same. Whatever dividends may be declared in the future, in which these shares participate will be properly apportioned by me after the shareholders have indemnified me fully in all matters I have assumed in their behalf, and have relieved me of the many obligations in connection therewith, as also paid me for my claim of services, heretofore referred to, which is to be satisfactorily agreed on. If we cannot agree on this, I am willing to have it either — arbitration or a court of justice.

Regarding our last year's inventory, I am in hopes of closing same up as best we can temporary. We have found an error of \$21,000 in the additions of the previous warehouse inventory, where I surmised it was. I shall have our books gone over and audited and am now on the track of the right man for this and hope to make several changes in this direction. I am sorry that you are complaining about your health. I am also more than anxious that whatever conclusions about our business that — come to should be consum-

126 mated with as little delay as possible. My offer to buy you out in my last was exactly in accordance with our conversation when last in New York. If this plan does not suit you and you will not buy me out, we must wind up. I wish to disabuse your mind, however, of the length of time and more especially of the * * * of all outstandings in such event. The losses in such circumstances will be tremendous, and in addition, tedious. Your method of disposing of the real estate is also not practicable, as each piece is different. If there were twelve vacant lots in a block they could be divided this way, but not as our property and — are. I have repeatedly told you that I did not put your Ray money in the business, that I had nearly as much with the firm as you had, and I further say that you have no right to charge more than 6 per cent per annum in accordance with our contract and my repeated letters on this subject, and that I never knew you were charging more than 6 per cent until I noticed it on books.

I furthermore showed you where you had cleared the \$250 (?) you refer to over and above what you were entitled to have many times over. It is unjust for you to make any insinuations about what the firm has paid me. I have been more than conscientious in my personal dealings with the firm, and I have 127 never been allowed a cent I was not entitled to; on the contrary, there are thousands of dollars that have been personally disbursed by me, that should have been paid by the firm. We have placed most of our orders by retail. This will * * * on a most limited scale. I have no doubt but that we will arrive at some reasonable solution as to the future of this business, and we must have our goods in time to be prepared to compete for business. The outlook for business this coming season is very good and we ought to show quite an improvement.

I closed up the business, which was in charge of Walter and same turned out very bad. One loan will be over \$5,000. Walter left here for California a few days ago. He will be at Linda's wedding in Los Angeles today, and then go to the city, where he expects to

locate in the future. He is very ambitious and good too, but requires experience and more application. I understand Linda is getting a very nice young man for a husband. They have known each other for some time, and I hope they will be happy.

Business is keeping up quite well. Reports from Silver Bell are very favorable, and I don't doubt that they will send each
128 payment when due. In fact, I believe that they will take up the entire obligation this fall, and * * * the * * * east. We had a narrow escape Sunday at our warehouse. The San Xavier Hotel burned to the ground and twice our place caught on fire in the yard. The company will not rebuild same.

My family are all in San Francisco since last month and I expect to leave for there next week. I feel very much run down and require a change very much.

With much love to all,

Your sincere nephew,

ALBERT.

SEPTEMBER 30, 1903.

Steinfeld to Zeckendorf:

The firm is not further interested in Silver Bell Company, the debt is paid. There can be no dividends by S. B. C. Co. until its obligations are first settled. When the next payment is made in November, a dividend can probably be declared and paid after making provisions to meet its obligations, provided the individual shareholders will indemnify me for the obligation I have assumed, etc., as already written.

The following exhibit of the disposition of the proceeds of the sale of the entire group of mines, appears in evidence, to wit:

1903—		Cash Received.
May 20.	Imp. Copper Co. 1st payment.....	\$115,000.00
Aug. 23.	Imp. Copper Co. 1st note.....	101,500.00
Nov. 23.	Imp. Copper Co. 2d note.....	102,987.00
1904—		
Jan. 20.	Sale of last two notes.....	207,934.00
		<hr/>
		\$527,421.50

1903—		Disbursements.
May 21.	L. Zeckendorf & Co.....	\$74,383.00
May 21.	N. O. Murphy com.....	22,500.00
May 21.	Albert Steinfeld, contract.....	18,117.00
Aug. 23.	L. Zeckendorf & Co.....	35,000.00
Sept. 4.	L. Zeckendorf & Co.....	5,000.00
Oct. 20.	F. J. Heney, retainer (Franklin suit).....	1,500.00
Nov. 25.	Smith & Ives, retainer (Franklin suit).....	1,500.00
Jan. 21.	L. Zeckendorf & Co.....	175.37

Jan. 21.	E. S. Ives.....	114.00
	Mrs. Nielsen, contract.....	10,000.00
	Mrs. Francis, contract.....	12,700.00
		<hr/>
		\$180,793.77
	Balance on hand.....	\$346,627.73
		<hr/>
		\$527,421.50
	Value per share, \$495.181½.	
	Value 250 shares, \$123,796.25.	

130 The aforesaid value of the 250 shares of stock in the Silver Bell Copper Company owned by Louis Zeckendorf individually, after the sale of the mines had been completed, and amounting to \$123,796.25 is all clear net profit to Louis Zeckendorf, over and above any amount invested in the mines by Louis Zeckendorf & Co.

After Zeckendorf had received, as shown by this amount, all of the money owing to it from the Silver Bell Copper Company for merchandise and cash advances, including the sum of \$250,000, which was paid by L. Zeckendorf & Co. to Wm. Zeckendorf for the Old Boot mine, together with interest at the rate of ten per cent per annum upon every dollar of money so advanced and of merchandise so sold.

Said account further shows that nearly \$75,000 was paid to L. Zeckendorf & Co. by Albert Steinfeld upon his account for advances and sales of merchandise out of the initial payment of \$115,000 cash which was received from the Imperial Copper Company on May 20, 1903. This amount would have paid the entire indebtedness due to L. Zeckendorf & Co. for merchandise and cash sold and advanced, to the Silver Bell Copper Company, together with interest at 131 the rate of ten per cent per annum.

Said account further shows that two further payments of \$35,000 and \$5,000 respectively were made to L. Zeckendorf & Co. out of the proceeds of the first note for the purchase price of the mines, and these payments amounting to a total of \$40,000 covered the entire amount of money, to wit, \$25,000, which was paid to Wm. Zeckendorf for the Old Boot mine, together with ten per cent per annum interest thereon, from the dates said money was paid, together with all amounts of money expended in acquiring surrounding ground other than the English group of mines, with ten per cent interest per annum upon the cost thereof.

Hence, all money which Louis Zeckendorf was to receive individually, upon his 250 shares of stock, represented net profit, as the stock had not been issued to him until after L. Zeckendorf & Co. had been paid in full, or its payment in full made certain; and consequently, the stock did not represent a single dollar of investment upon the part of Louis Zeckendorf, either directly or indirectly.

All dividends to Louis Zeckendorf would represent net profit from

132 the mining investment which was originally entered into by Steinfeld and Zeckendorf, solely to protect the indebtedness of \$16,000 which was due to L. Zeckendorf & Co. from Nielsen as an individual.

Just prior to the acquisition of the English group of mines as hereinbefore shown by letters from Steinfeld to Louis Zeckendorf, they were anxious to sell the Old Boot group of mines for the gross sum of \$150,000.

Just as soon, however, as the English group of mines had been secured by Albert Steinfeld individually, and put into one single joint property with the Old Boot group, the amount asked for the joint property, as shown by the letters between Steinfeld and Zeckendorf, hereinbefore quoted, was never less than \$375,000, and was on most occasions from \$500,000 to \$600,000.

After Steinfeld took one-half of the net proceeds of the sale of the joint groups of mines for his share of the purchase price, as the owner of the English group of mines, the Silver Bell Copper Company nevertheless received in round numbers the sum of \$250,000 for the Old Boot group of mines which L. Zeckendorf and Steinfeld had been so anxious to sell for the gross amount of \$150,000, just prior to the acquisition by Steinfeld of the English group
133 of mines with his own money.

Moreover, the Old Boot group of mines, as shown by the undisputed evidence, could probably not have been sold for even so much as \$150,000 gross, except in conjunction with the English group of mines as one single joint property, because it was obvious to any expert who inspected the property that the ore body of the Old Boot mine extended into the English group of mines, and that the probable value of said ore body might be found there.

Hence, Louis Zeckendorf personally netted a large profit upon the investment of L. Zeckendorf & Co. in the Old Boot group of mines, even under the disposition finally made of the proceeds of the sale of the joint groups, and was not personally injured a single dollar by the rescission of the contract of May 20, 1903, except in so far as he might have been deprived of his share of an absolute gift which had in effect been made by Steinfeld to the Silver Bell Copper Company of the entire value of the English group of mines which belonged to him individually and which amounted to at least one-half of the purchase price received from the sale jointly of the Old Boot group of mines and the English group of mines.

34 Moreover, it will appear from the following testimony, which was given upon the trial in the District Court, that Louis Zeckendorf deliberately forced Steinfeld to reconsider his generous action in making the aforesaid gift, by voluntarily attacking Steinfeld's motives and actions and by attempting to injure Steinfeld's individual credit after they had agreed to dissolve their mercantile partnership.

It will also appear from this testimony that Steinfeld was perfectly willing to permit dividends to be declared and paid by the Silver Bell Copper Company so that Louis Zeckendorf individually could receive the share of the net proceeds of the purchase price to

which he was entitled by reason of his ownership of the 250 shares of the stock of that corporation, provided only that Steinfeld should be properly protected against individual liability upon the obligations he had assumed upon matters for which the Silver Bell Copper Company was to receive all the financial benefits, and particularly upon his individual guaranty of the titles to each and all of the claims which constituted the entire group of mines, which was sold to the Imperial Copper Company.

Upon the trial; ALBERT STEINFELD, on these points, testified in part as follows:

135 Mr. Zeckendorf came to Tucson in 1903. I think he came here on the 20th of October, 1903; it was in the latter part of October, anyway.

Shortly after Mr. Zeckendorf came here he asked me about why I was holding the money and why there was no dividends declared in the Silver Bell Company. I told him that at the time there was on hand about \$60,000, \$51,000 of which was garnished by Mr. Franklin and there had to be provided for the payments to Volkert on the contract \$12,500, and to the Nielsens \$10,000 and that there could be no dividends under the circumstances. He said that he did not think that the garnishment claim of Mr. Franklin amounted to anything, and he did not see any reason a dividend could not be declared on that. We had several talks and he said that he could not see any reason why a dividend should not be declared under the condition of the company then, but I could not see any reason why I should declare a dividend at that time. I told him that I was perfectly willing that there should be a dividend declared when the next note was paid, which was due some time, I think it was on the 20th of November. This conversation happened the early part of November, if I remember right. I told him, as I said, that I was perfectly willing that a dividend should be declared on that

136 note provided, however, that the various stockholders should fully indemnify me in the various matters I had assumed, and that I would first hold out the amount of the Franklin garnishment, and pay off these debts, the Francis and Volkert and Nielsen claims, and I would distribute the balance provided I was indemnified, but that did not suit him at all.

He said that the Franklin garnishment did not amount to anything. He had a short time previous to that requested to know who had been employed to defend this Franklin suit. I told him that Mr. Heney had been employed and that I sent the minute book of the company to him so that he could prepare an answer to the Franklin suit and Mr. Zeckendorf asked one time to see the minute book, and I told him that I had sent it up there to Mr. Heney, and he requested me to have it returned and I wrote to Mr. Heney, and requested that he return the minute book immediately; and his assistant wrote me that Mr. Heney had left for Washington and had taken the minute book along with him, that he wanted to prepare the complaint on the train and that he was expected back in

about a week, and that just as soon as he came back he would return the minute book.

I told Mr. Zeckendorf that. I told him a few days after that.

Mr. MESERVE: I would like to see that letter.

137 Mr. HENEY: I guess we can find it; it was written by my assistant, Mr. Frost.

I think I have that letter; it must be in one of the files, I remember it perfectly. A few days after that, anyway, Mr. Zeckendorf informed me or showed me in the paper where it mentioned that Francis J. Heney had just returned; and he wanted to know why that book had not come. Well, I don't remember whether I wrote or telegraphed to have that book returned; but at any rate I expected the book back any day, because Mr. Heney's assistant informed me that he would return it as soon as Mr. Heney came back, he would send it. I forget just exactly what day it was. Well, I think it was on the 21st day of November; just the day after I had received a telephone message from the Phoenix National Bank that the second note had been paid that afternoon, after banking hours.

I had immediately informed Mr. Zeckendorf that it had been paid. I told him that it had been paid and the next morning Mr. Zeckendorf came around and he asked me if that minute book had come and I said no. I said the train is not in yet, and he said he wanted to see it and he says: I want to have a talk with you about that; and he took me in his private office and closed the door and he made a demand on me in writing that I should immediately give 138 him a check on the Bank of California for \$50,000, and an order on the Bank of California for \$25,000 to be paid out of the next note, and another one for \$25,000 to be paid out of the last note, making altogether \$100,000. And he made this demand in a very threatening and abusive manner, so much so that I thought he was out of his mind; he was in such a rage, and so I asked him to come into the general office, and I told him then that I refused to comply with the demand; that he had no right to ask me any such thing, nor to make any such a demand as that; that any money he was entitled to he would get as a stockholder of this company after a dividend had been duly declared, and he said, "if you don't give me that money, I'll bring some legal proceedings, and I will compel you to do so." I informed him that he could not make any such demand upon me, and that I would consult an attorney and be guided entirely by his advice in this matter. He said he would wait for the minute book; then he asked me to give him a copy of the letter which I sent to the Bank of California, and I think it is — evidence here. It had been sent before.

It was shortly before the bringing of the Franklin suit and was sent to the Bank of California. Mr. Rochester Ford was the attorney whom I consulted, and who advised me that I send these 139 notes in this manner in this form, and I give him a copy of the letter which he asked for. The next thing I heard was letter from the Bank of California. They had collected the note in question and said they were compelled to hold this money under

telegraphic request of Mr. Zeckendorf or his attorney. I consulted in the meantime with Mr. Ives, and after talking the matter over, I concluded to go to San Francisco. I then proceeded to San Francisco and Mr. Ives happened to be going on the same train and we went together. I went to the bank the same day that we arrived to see the bank people and they told me—at first I thought of sending Mr. Ives up himself. Mr. Ives went on some business for Mr. Greene, he told me. I did not know he was going on the same train until he informed me.

I went to the bank that same afternoon; the train was late getting into San Francisco. Mr. Ives was with me and we went direct from the train to the bank and we stated the case to them and explained to them the situation under which I held these notes and the proceeds of them. I was prepared to prove to their entire satisfaction that I held them by legal authority, that I was the rightful owner of them, and I demanded that they should turn over the notes and the proceeds to me. They informed me that Mr. Zeckendorf would be in the next morning and under the circumstances they would
140 do nothing until Mr. Zeckendorf arrived. The next morning we went to the bank and they informed us that the train was late and that they would take no action until they saw Mr. Zeckendorf. The next morning after that we went there and just as we got to the bank we met Mr. Zeckendorf and Mr. Nuttall coming out. As soon as we went in there we demanded an answer and wanted to know what they were going to do. Mr. Anderson, the vice president of the bank, informed me that Mr. Zeckendorf and Mr. Nuttall had left there and expressed the desire and willingness to meet us, and he asked me what time it would be convenient for us to meet them and I said immediately. Mr. Anderson called Mr. Lilienthal by telephone and he said that he would be engaged in some other matters and could not meet us until half past 11 that morning, and asked if it was agreeable to make a definite appointment for 11:30; the appointment was made. We returned to the bank and just after I got into the bank I was served with an attachment suit with the papers. I was very much provoked. I went to Mr. Anderson and asked him what this meant. I said we were to meet these gentlemen here for a friendly conference and I was served with this attachment
141 suit. He expressed his surprise at any such proceeding. Then Mr. Zeckendorf and Mr. Anderson and Mr. Ives and myself and also the attorney for the bank, Judge Allen, went into a room there in the bank and had a conference. Mr. Ives asked what this meant. He asked for an explanation and demanded to know whether this was a proceeding we were to answer and asked the bank whether they intended to make a delivery of this money and the notes.

Mr. Lilienthal stepped up and said they had brought this attachment suit as a temporary expedient; that he was then preparing a stockholders' action in which he would ask for and obtain an injunction to stop the delivery of these notes and money, and then the matter was discussed further as to what should be done.

About the probability of the settlement and what we would do; I

said we would do just exactly what I thought of doing in Tucson; that out of this first money I would retain the amount of Mr. Franklin's garnishment and declare a dividend, provided I was fully protected. Mr. Lilienthal asked to see the minute book and we agreed to deliver it to them. From the bank we went to Mr. Heney's office, met Mr. Heney there and got the minute book, and Mr. Ives and myself took it right over to Mr. Lilienthal's office. Mr. Lilienthal agreed to give us an answer as to what he would do in the matter about 5 o'clock that evening. At 5 o'clock that evening we
142 received a letter. That is the letter that has been introduced in evidence by Mr. Ives.

The next morning we met Mr. Lilienthal in his office. There was present Mr. Lilienthal. Mr. Zeckendorf, Mr. Ives and myself and we discussed the matter pro and con. Mr. Lilienthal made several suggestions and we finally agreed to a satisfactory settlement of all of our difficulties.

We made some minor concessions. I forgot to state in my talks with Zeckendorf in the first place, before there was any trouble or complaint that I would give a bond for holding this money, I offered to furnish a bond as security. That was before there was any trouble at all. In this conference with Mr. Lilienthal, this same subject was brought up and we agreed to deposit this money in my name as treasurer, and that all I wanted was to be protected. This was first agreed upon, the whole matter was to be subject to two conditions, the first was that he was to immediately dismiss the attachment suit, and the second was, that he was to go with me, and in my presence say to the Bank of California that he was wrong in the position he had taken; that I was holding this money rightfully and in accordance with my agreement with the company.

143 Q. What was your reason for insisting upon that point?

A. For the simple reason that I had been doing business with the bank for over twenty-five years.

Q. You had arranged all the credit of the firm with the bank at all times?

A. I made that one of the precedents. Anyway, it was upon these two issues and these two issues alone, that this agreement became absolutely nothing. I insisted upon these two issues being complied with, and he absolutely refused to comply with them. We returned to Tucson, and I expected in good faith to carry out my agreement with this company. I expected to declare a dividend when I returned here and have this money released as I thought of giving a bond there in San Francisco to have the money in the bank released, and I went to a bond company; a guarantee company, and they wanted quite an amount of money, so I did not get the bond there. Mr. Zeckendorf very well knew that he had no claim whatever against me, and that he ought to dismiss that suit. Shortly after that came this injunction suit, then followed these other suits which have been gone through here.

E. S. Ives.

E. S. IVES called as a witness on behalf of the defendants testified as follows:

144 Direct examination.

By Mr. HENEY:

I accompanied Mr. Steinfeld to San Francisco from Tucson in December, 1903.

I left here in November, 1903, and reached San Francisco I think in November, 1903, I know I did on the 30th of November. I accompanied him to the bank of California the first day I arrived there, either the 29th or 30th of November. Mr. Steinfeld and myself together made a demand on the bank in regard to the notes Mr. Steinfeld had on deposit there and cash. The bank said they would consult their attorney and let us know the next day. We went back there the next day sometime in the afternoon. They replied that they understood that Mr. Zeckendorf had left Tucson and was coming up there, that Mr. Steinfeld and Mr. Zeckendorf had been partners and both doing business with them for a great many years and they preferred not to give us a reply until he should get there the following day. We went back the following day. As we went in we met Mr. Zeckendorf and Mr. Nuttall, I understand now that is his name, coming out of the bank, about half past nine. We did not stop to talk with Mr. Zeckendorf. We went in and asked them if they had

arrived at a determination in respect to the demand which he
145 had made upon them. They said they would let us know about noon definitely.

We demanded the notes and the money and said that Mr. Steinfeld had deposited them there personally and we didn't think the bank had any right unless they were legally prevented from so doing, withholding from Mr. Steinfeld, property which he himself had placed there, merely at the instance of some third party who forbade them from so doing; and we expressed ourselves as very indignant at the stand the bank was appeared to be taking. They said they would let us know about noon definitely, and while we were there a telephone message arrived—I didn't hear the telephone—but Mr. Anderson, I think the vice-president of the bank or manager of the bank or perhaps the cashier, Mr. Moulton, one of them stated that Mr. Zeckendorf or some one representing him; that Mr. Zeckendorf had telephoned he would meet us there about noon, and asked us to be there at that time, and we said we would, and left.

We went back there at noon. As we went into the bank Mr. Steinfeld was served with a copy of a summons and complaint in an attachment suit, an action for debt, the complaint in which is in evidence in this case. That is the one in which the attachment was issued, a suit for some \$62,000.

146 We found Mr. Zeckendorf and Lilienthal, his attorney, Mr. Anderson, Mr. Moulton, the cashier and Judge Allen the

attorney for the bank. We then proceeded into the directors' room, all of us, at the invitation of Mr. Anderson.

Well, I think I opened it up by telling Mr. Anderson that he had promised to give us an answer at noon as to whether he would deliver to us the notes and the money which Mr. Steinfeld had deposited with them, and I wanted an answer; and Mr. Anderson stated that the bank was unable to give us the money on the notes because they had been served with a writ of attachment or garnishment. I forget which; and I thereupon said, "well, Mr. Anderson, you need not worry about that; I want an answer in behalf of Mr. Steinfeld, I, representing Mr. Steinfeld, I want an answer; if you will give us the notes and the money and only withhold them by reason of the attachment, we can dispose of the attachment in a very short time; I want to know now if you will deliver us the notes and the money;" and he then said he would consult Judge Allen and let us know about it. I told him that we would not wait—Judge Allen was there—we had been there two or three days and they promised us an answer at noon; it looked to us as if they knew that Mr. Zeckendorf was going to bring this suit and held Mr. Steinfeld off in order to give

47 Mr. Zeckendorf time to bring suit; and we said we would not stand any more nonsense from them and we wanted to know definitely what they would do and we would dispose of the attachment; and Mr. Anderson and Judge Allen were evasive; they didn't answer (strike out the word evasive); Mr. Lilienthal then came to their rescue and he said, "well, Mr. Ives, we will relieve our friends the bank here of answering any embarrassing question; and I will tell you now that I have dictated the papers in a stockholders' proceeding, which Mr. Zeckendorf, as a stockholder of the Silver Bell Copper Company, will bring and in which we will ask and in my opinion obtain, an injunction restraining the bank from delivering these notes and this money to Mr. Steinfeld, and, therefore, if you get your attachment released, I will have my injunction before you can get your bond and get it released and it won't do you any good to have it done, and our friends, the bank, will be relieved from any responsibility of determining what they would do in the premises." I can't give the exact language, of course, Mr. Heney; but that is the precise purport of it, the substance.

Then Mr. Anderson suggested that Mr. Steinfeld and Mr. Zeckendorf talk the matter over and see if they could not come to some arrangement with each other. The action of the bank was pacific from the outset, except they would not give us the notes and the money. Mr. Lilienthal then said that the minute book had been withheld from Mr. Zeckendorf, and I explained that Mr. Steinfeld hadn't had it in Tucson; that I understood from him that it had been in the hands of Mr. Heney in San Francisco and in Washington. Mr. Zeckendorf expressed some incredulity; and Mr. Lilienthal said it was the duty of Mr. Steinfeld to keep the book where it could be inspected at all times; and I told him I didn't think it was the duty; that under the Arizona statute Judge Davis has decided that a stockholder was not, without legal proceeding, entitled

to an inspection of the minute book, under our statute, and we had some discussion on that.

We were a little angry and then Judge Allen asked me:

Q. Had you seen the minute book at that time?

A. I had never seen it.

Q. Did you know there was a by-law that authorized stockholders to see it?

A. I did not; I never had seen it. And then Judge Allen asked us if we persisted in not showing the book to Mr. Zeckendorf, and I told him I did not; that I had never seen the book. I was asserting a right when they criticised us that the minute book had not been held in Tucson subject to inspection of Mr. Zeckendorf; and

149 I told Mr. Lilienthal and Mr. Zeckendorf that I had no doubt we would deliver them the minute book within a short time, and we thereupon left with the understanding that after lunch I should let Mr. Lilienthal have the book. I then proceeded with Mr. Steinfeld to the office of Mr. Heney where we found the book, and I read it, and after lunch, sometime between two and three o'clock, I handed it to a clerk in Mr. Lilienthal's office, Mr. Lilienthal being absent, not having returned from his lunch, and took a receipt for the book, that it should be returned to Mr. Steinfeld or myself upon demand. The book stayed in Mr. Lilienthal's office for two or three days.

We then met the next morning. We left the minute book with Mr. Lilienthal until the next morning, and Mr. Steinfeld and myself met Mr. Zeckendorf and Mr. Lilienthal in Mr. Lilienthal's office. We discussed the controversy. Mr. Zeckendorf wanted an immediate distribution of the funds, and he wanted the money and notes withdrawn from Mr. Steinfeld's personal control and placed in some bank to the credit of the Silver Bell Copper Company. I thereupon stated on behalf of Mr. Steinfeld that under the agreement which Mr. Steinfeld had with the company, Mr. Steinfeld was entitled to the custody of the notes and of the money until he should be
150 discharged from certain guarantees he had made and we examined the minute book, the agreement dated May 20th; we didn't have it with us in San Francisco, but we examined the minute book and it appeared that parts reciting the substance of that agreement had lines drawn through them on the minute book, and we didn't have it. That agreement, Mr. Steinfeld stated to the best of his recollection, provided that he should have the custody of the notes and money and should have the right to prevent any distribution of the proceeds until he should be discharged from his guaranty. Mr. Lilienthal suggested that Mr. Zeckendorf would give a bond to indemnify Mr. Steinfeld and Mr. Steinfeld said that would be satisfactory to him, and this lasted a day or two. I don't remember, maybe three or four days; I don't remember exactly how long; but Mr. Zeckendorf or Mr. Lilienthal finally made a proposition that Mr. Zeckendorf should be elected as director of the Silver Bell Copper Company, and Mr. Steinfeld assented to it, and finally we had substantially come to an arrangement one morning—

Q. Before you come to that, was there anything said about the

terms of the option of July 15th, 1901, referred to, which appears in the minutes, as to the \$18,000?

151 A. I stated to Mr. Lilienthal, during the course of these conversations, when he talked about this injunction suit which he threatened to bring—and I anticipated myself here a little. Then we left the bank with the intention of conferring to see if this difficulty could be avoided. Mr. Lilienthal said if we would agree not to get a bond and release the attachment, he would agree not to file his complaint in the stockholders' suit and get an injunction; but we would wait until our negotiations either resulted in an agreement or disagreement. In the course of our negotiations, Mr. Lilienthal at times alluded to this injunction suit, the papers of which had been prepared by him, and I told him then we would agree that Mr. Steinfeld had told me—

Q. Was this in the presence of Mr. Zeckendorf?

A. Yes, I think it was, all in the presence of Mr. Zeckendorf; I might possibly be in error about that because at times I would go out with Mr. Steinfeld and leave Mr. Zeckendorf in Mr. Lilienthal's private office; and he furnished Mr. Steinfeld and myself with a private office where we withdrew to consider. It may be that I had some talk in which Mr. Zeckendorf was not present; but I think he was present at all of them. But in any event I told Mr. Lilienthal that

152 Mr. Steinfeld told me that the Silver Bell group of mines which he had purchased and paid his own money for, were worth more than the original properties of the Nielsen Mining and Smelting Company, and that if he brought an injunction suit, as a stockholder, he would in order to withhold from us the custody of those notes, he would have to ask that this agreement of giving us the custody be rescinded and that if he did, the proposition of July 15, 1901, having elapsed, Mr. Steinfeld would get back and be entitled to his proportionate share of those proceeds, and I thought that Mr. Zeckendorf might suffer a loss, a considerable loss, and Mr. Lilienthal laughed at me, at my view of the legal status.

Q. You finally reached a conclusion?

A. We finally reached a conclusion. Mr. Steinfeld all through insisting that he felt very much injured and outraged at the newspaper reports, the attachment suit, and of the injury he thought, to his standing, integrity and credit, particularly to his standing and integrity; and he insisted as a condition precedent that Mr. Zeckendorf should state to the Bank of California that Mr. Steinfeld had had an absolute right to the custody of those notes and that money. I remember Mr. Zeckendorf stating that he did not like to admit, or go to the bank and say he had advised them that Mr. Steinfeld

153 didn't have a right to them, when, as a matter of fact, Mr. Steinfeld had the right, and I suggested to Mr. Lilienthal or Mr. Zeckendorf that they could go to the bank together and make that statement without in any way impairing his own dignity, because he could say that he never saw the agreement of May, 1903, giving Mr. Steinfeld the right to the possession of these notes and proceeds, and having seen the minute book he could go to the bank

and say that he was mistaken and say that Mr. Steinfeld had the right to them. And finally it was agreed that Mr. Zeckendorf should do that, and that he should be elected a director in the Silver Bell Company and Mr. Zeckendorf should give Mr. Steinfeld an indemnifying bond for the guaranty, and the distribution should take place immediately and the suits should be dismissed at once. No, the injunction suit had not been brought. The attachment suit should be dismissed.

Q. Now then, after having reached conclusion, did either side prepare a proposition covering it?

A. Yes, that was in the morning around 11 or 12 o'clock, Mr. Lilienthal said if we would meet him at his office in the afternoon, he would in the meantime have prepared a paper setting forth the terms of this arrangement that had been arrived at; and Mr. Steinfeld and myself left and came back to Mr. Lilienthal's offices in the
154 afternoon, and he had such a paper in typewriting in duplicate and he gave me one of them and I have it in my hand.

Mr. HENEY: We will offer that as a part of the examination. Just read it.

(Witness reads the paper.)

Q. Was that agreement read there by you people at the time?

A. That agreement was handed to me and I read it.

Q. Go ahead and tell what happened.

A. When I got to paragraph 9, which says: When all the foregoing things except those mentioned in the last paragraph, which was when the unpaid notes were collected, shall have been done, the action brought in San Francisco shall be dismissed, I stopped and said to Mr. Lilienthal and Mr. Zeckendorf that the express understanding and the chief purpose of Mr. Steinfeld having any negotiations with them was that forthwith the suit should be dismissed and that Mr. Zeckendorf should state to the Bank of California that Mr. Steinfeld had had a legal right to the custody of the notes and money all the time and that we would not come to any agreement with them unless the suit was dismissed, and that statement made by Mr. Zeckendorf to the bank. Mr. Lilienthal then stated that it was unusual that
155 anything should be dismissed until we had entirely fulfilled the contract; and I said, "Mr. Lilienthal, we cannot elect Mr. Zeckendorf a director until we return to Tucson; and Mr. Steinfeld is willing to sign the paper that we will do this. He is even willing to give his check now for the amount of the dividends which would come out of this present distribution to Mr. Zeckendorf, but he will not consent to anything unless today, or before these papers are signed, before we leave San Francisco, Mr. Zeckendorf will dismiss the attachment suit and will go to the bank and make the statement, that Steinfeld had a right to do it," until after—we should have returned to Tucson and complied with the things in entirety, and we thereupon broke up and that ended negotiations.

Mr. Zeckendorf and Mr. Lilienthal claimed that the 300 shares of stock belonged to the firm of L. Zeckendorf and Company, and Mr. Steinfeld claimed that under his proposition to the company,

which appeared in the minutes and their adoption, that all of the purchase price belonged to the Silver Bell Company, and that those 300 shares of stock by reason of that agreement belonged to the Silver Bell Copper Company and that they never belonged to L. Zeckendorf and Company and they acceded to our position.

Nothing was said at that meeting to the effect that the 156 300 shares of stock had been bought by Mr. Steinfeld for the Company or for Zeckendorf and Company; that they had been bought by him for that.

I heard the testimony of Mr. Zeckendorf on that subject. I heard the testimony of Mr. Zeckendorf in reference to refusing to let him see the minute book after I got back to Tucson. I don't know what explanation, if any, I have to make to that. He had the minute book, or Mr. Lilienthal had it for several days in San Francisco. There was a good deal of feeling at the time. I made no objection in San Francisco to Lilienthal making a copy of it. He had it in his possession for three or four days. I didn't make him promise that he wouldn't copy it. When that resolution was passed, the exact purpose of it I don't remember; at the time the resolution of December 9th, changing the by-laws but as a matter of fact, when Judge Barnes first came to me about it, which I think was several days before the minute book was delivered to Mr. Zeckendorf, as I remember, but I know they had it for over a week before this stockholders' meeting at which the resolutions was rescinded.

Q. You just had a little fit of temper I suppose?

A. Well, all of us were a little bit hot.

I don't know what was the purpose in passing that resolution confirming the right of inspecting the books to the directors, except to make it conform to the Arizona statute as I understand it to be, that a stockholder was not entitled to it. 157 I do not think a director could give a proxy. I have never been of that opinion, but I wanted it to appear that Mr. Curtis had no objections to it, to the change; I don't remember for certain what was done but they saw the book within a few days after that; and that was the only time I objected to them seeing the book. They have had the books as often as we have. I may state that in San Francisco I stated to Mr. Lilienthal what Mr. Steinfeld understood to be the contents of the agreement of May 20th, and on my return I had a copy of that agreement sent to Mr. Zeckendorf or Judge Barnes and offered to let them examine the original and compare it with the copy, if they wished. Mr. Lilienthal or anyone there did not ask me for a copy of the option of July 15th, 1901. The substance of it was spread out on the minutes; but in any event they never asked me for it; I don't think I had ever seen it. I didn't see it for a long time. I think Franklin produced it; I don't remember when I first saw the proposition. I think I had not seen it at that time. I might be mistaken about that. You understand I had never been Mr. Steinfeld's attorney in any matter until a few days before this, and I was totally unfamiliar with his affairs. 158 When I say before the trial, I mean before the Franklin trial, I mean before the Franklin trial I think I found out

that Mr. Heney had that and that he sent it down a long time afterwards. I don't remember that I had ever seen it until after this suit was brought. I don't know whether Mr. Heney had ever seen it.

Mr. HENEY: I had Mr. Steinfeld's copy in San Francisco.

Mr. IVES: I don't know. I may have seen it in San Francisco. As I say I was not familiar with the papers or the issues at that time; it was all new to me.

Cross-examination.

By Mr. MESERVE:

At the time I caused this change to be made in the by-laws of the Silver Bell Copper Company, by having Mr. Donau act as a proxy for Mr. Curtis I knew there was only one other stockholder in the corporation besides the directors and that was Mr. Zeckendorf. I think the purpose of the resolution was undoubtedly to affect Mr. Zeckendorf. I was not familiar with the penal statute when I passed that resolution.

By the COURT: When was it that the injunction suit was disposed of?

159 The injunction suit never has been dismissed; the attachment suit was dismissed after this agreement of re-cission, sometime between the 29th of December and the 2nd or 3rd of January.

Mr. Heney introduced the following letters in evidence:

Letter dated Oct. 30, 1899, Louis Zeckendorf to Albert Steinfeld, which is marked Defendants' Exhibit "AA."

Letter dated March 16, 1900, from Louis Zeckendorf to Albert Steinfeld, which is marked Defendants' Exhibit "BB."

Letter dated April 25, 1900, from Louis Zeckendorf to Albert Steinfeld, which is marked Defendants' Exhibit "CC."

Letter dated New York, May 9, 1900, from Louis Zeckendorf to Albert Steinfeld, which is marked Defendants' Exhibit "DD."

Letter dated June 2, 1900 from Louis Zeckendorf to Albert Steinfeld, which is marked Defendants' Exhibit "EE."

Letter dated June 17, 1901, from Louis Zeckendorf to Albert Steinfeld, which is marked Defendants' Exhibit "FF."

Letter dated September 3, 1901, from Louis Zeckendorf to Albert Steinfeld, marked Defendants' Exhibit "GG."

Letter dated December 14, 1901 from Louis Zeckendorf to Albert Steinfeld, marked Defendants' Exhibit "HH."

160 Letter dated May 21, 1903, from Louis Zeckendorf to Albert Steinfeld, marked Defendants' Exhibit "H."

Mr. HENEY: We have a statement of account. I will show it to you. You can verify it yourself, if you want to.

JESSE W. LILIENTHAL.

Deposition of Jesse W. Lilienthal, a Witness on Behalf of Plaintiff.

My name is Jesse W. Lilienthal, my age is 49; my residence is San Francisco, California, and my occupation is that of a lawyer. I know Louis Zeckendorf, Albert Steinfeld and Eugene Ives.

Said Zeckendorf, Steinfeld and Ives did meet with me No. 202 Sansome Street, San Francisco, in the first week of December, 1903 and conversed with me about all of the matters referred to in the interrogatories. I cannot fix the date closer than that it was between the first and the fifth of December, 1903. No one was present except those three gentlemen and myself. An action had been begun by Mr. Zeckendorf against Mr. Steinfeld and further proceedings were threatened, and an attempt was made at this interview to compromise the differences between these two gentlemen. One of the points discussed was the status of the 300 shares of stock of the Silver Bell Copper Company as to which Mr. Zeckendorf claimed that they had been bought for the firm of L. Zeckendorf & Co., while Mr. Steinfeld contended that they had been bought for the Silver Bell Copper Company. Mr. Zeckendorf finally agreed to concede this and then calculations were made as to the proportions in which the various stockholders were interested in the proceeds of the sale of the Silver Bell Copper Company's properties. The Imperial Copper Company which had realized \$515,000 of which \$115,000 had been paid in cash and the balance in four promissory notes of \$100,000 each bearing interest at six per cent. was admitted that Mr. Steinfeld had 250 shares of the Silver Bell Copper Company; Mr. Zeckendorf 250; Mr. Curtis 170; and Julia Zeckendorf 30. I figured that Mr. Zeckendorf was entitled to 25-70; Mr. Steinfeld figured it 357-1-7 1000. We finally agreed that the result was the same.

Further matters in controversy were discussed with a view to a compromise, and it was then agreed that out of the funds on hand \$1,500 should be paid on the Volkert-Francis contract, and \$10,000 should be paid to the Nielsen estate; that \$1,500 should be reserved to apply on the F. J. Heney contract, and the sum of \$150,000 should be reserved to protect Steinfeld on the garnishment on an action brought in Arizona by one Franklin against the Silver Bell Company or of said Steinfeld assumed on behalf of the company.

It was further agreed that a meeting of the board of the Silver Bell Company should be called, at which Mr. Shelton, one of the directors, should resign and Zeckendorf elected to fill the vacancy. That at said meeting a dividend should be declared payable immediately of \$87,000. It was further agreed that Steinfeld should deposit \$50,000 in banks to be approved by him and Zeckendorf; said deposit to be in the name of Steinfeld as treasurer of the Silver Bell Company but to be surety to him for any liability arising from said garnishment or other obligations assumed by Steinfeld.

for the Silver Bell Company. Mr. Steinfeld agreed to furnish a bond of indemnity approved by Mr. Zeckendorf for the observance of the agreement. Mr. Zeckendorf further agreed to hold said Steinfeld harmless to the extent of 25-70 from any liabilities that might be established against Silver Bell Company or said Steinfeld by virtue of his guarantees and including any claim that he might establish on his claim for compensation for services, unless as to the latter it was determined that Mr. Zeckendorf by virtue of the articles of copartnership of L. Zeckendorf & Co. was entitled to share in said compensation; it was also agreed that no action
163 pending or brought to enforce any claim against the company or Steinfeld should be compromised without the consent of Zeckendorf. Also, that when the unpaid notes of the Imperial Copper Company were collected respectively dividends of the full amounts of the proceeds should be declared by the Silver Bell Company. It was also agreed that when everything had been done except the payment on the dividends last mentioned Zeckendorf should dismiss the action brought by him against Steinfeld. In the meantime said unpaid notes were to remain in the hands of the Bank of California for collection, the proceeds to be distributed by means of said dividends. The right was to be reserved to either of the parties to present claims for traveling or other expenses incurred in coming to San Francisco in connection with the negotiation. I therefore prepared a draft of an agreement along these lines, but Mr. Steinfeld stated that he had changed his mind and would not sign the same.

At said meeting I acted as the legal adviser of Mr. Zeckendorf and Mr. Ives acted as legal adviser to Mr. Steinfeld.

As I already said, Mr. Steinfeld stated that the 300 shares bought from the Nielsens belonged to the Silver Bell Copper Company.

Mr. Steinfeld distinctly stated that said 300 shares were bought by him for the Silver Bell Company, and he made such state-
164 ment in connection with the denial of the claim of Mr. Zeckendorf that the same belonged to the firm of L. Zeckendorf & Co.

I cannot remember any thing further than as already testified. Mr. Steinfeld claimed the right to retain all proceeds of the sale made to the Imperial Copper Company, to protect him against contingent liabilities assumed by him on behalf of the Silver Bell Company.

Answers to Cross-Interrogatories.

A suit had been commenced by Zeckendorf against Steinfeld previous to any conversations had by me with Mr. Steinfeld in which suit I was the attorney for the plaintiff, but I am not sure that such suit was brought prior to any conversation had by me with Mr. Ives.

I attach copy of complaint in suit commenced by me and affidavit as requested, and would say that I did have the authority from Mr. Zeckendorf in question.

I did state to said Steinfeld and Ives that the attachment suit might have been misconceived and that the remedy to get the proceeds of the sale of the Silver Bell property now seemed to be in the Silver Bell Company and that if the company would not take action for the protection of its stockholders a suit would have to be brought by one of the stockholders for its benefit and that if necessary I would advise Mr. Zeckendorf as such stockholder to bring suit if the matters were not adjusted.

Int. State whether thereafter you brought any such stockholders' suit, and if so, attach to this deposition a copy of the complaint and of any affidavits made by yourself or Zeckendorf in such suit; and state whether you were authorized by Zeckendorf to bring such suit and make and file any affidavit.

A. I attach copy as requested and had Mr. Zeckendorf's authority for the bringing of the suit.

It is obvious from Steinfeld's letters to Louis Zeckendorf subsequent to the sale of the mines, which are heretofore set forth and from the testimony of Jesse W. Lilienthal, that Steinfeld was not satisfied to make his generous gift of the entire proceeds of the English group of mines to the Silver Bell Company, and thus let that corporation have the benefit of his work and of the risk of his individual funds in acquiring the English group of mines without his being compensated by the Silver Bell Copper Company for his work and his risk in this particular, as well as for his work in effecting the sale of the joint groups of mines.

166 Steinfeld insisted upon such compensation in his letters to Louis Zeckendorf after the sale, and the testimony of Jesse W. Lilienthal shows that he was still insisting upon such compensation at the time of the attempt to compromise with Zeckendorf in Lilienthal's office.

The following part of Jesse W. Lilienthal's testimony is uncontradicted, and is open to no other construction:

"It was further agreed that a meeting of the board of the Silver Bell Company should be called, at which Mr. Shelton, one of the directors should resign and Zeckendorf elected to fill the vacancy and that at said meeting a dividend should be declared payable immediately of \$87,000. It was further agreed that Steinfeld should deposit \$50,000 in banks to be approved by him and Zeckendorf; said deposit to be in the name of Steinfeld as treasurer of the Silver Bell Copper Company but to be a surety to him for any liability arising out of the said garnishment or other obligations assumed by Steinfeld for the Silver Bell Company. Mr. Steinfeld agreed to furnish a bond of indemnity approved by Mr. Zeckendorf for the observance of the agreement. Mr. Zeckendorf further agreed to hold said Steinfeld harmless to the extent of 25-70 from any liabilities that might be established against Silver Bell Company or said Steinfeld by virtue of his guarantees and including any claim that he might establish on his claim for compensation for services unless, as to the latter it was determined that Mr. Zeckendorf by virtue of the articles of copartnership of L. Zeckendorf & Co. was entitled to share in said compensation."

* * * Mr. Steinfeld claimed the right to retain all proceeds of the sale made to the Imperial Copper Company, to protect him against contingent liabilities assumed by him on behalf of the Silver Bell Company.

It is preposterous to suppose that Albert Steinfeld returned to Tucson and immediately thereafter proceeded to procure the rescission of the agreement of May 20, 1903, without insisting that any of these conditions should be carried out, except upon the theory that he intended to follow the advice of his newly employed attorneys, Messrs. Ives and Heney, and consent to a rescission of the agreement of May 20, 1903, with the purpose of thereafter standing upon his legal rights as the individual owner of the English group of mines and of such proportion of the proceeds of the sale of the joint groups of mines as the value of the English group bore to the Old Boot group.

168 ALBERT STEINFELD testified in relation to what he did after his return to Tucson from San Francisco, as follows:

Q. You have testified that you instructed E. S. Ives to send a copy of the agreement of May 20th to Mr. Zeckendorf. Please state whether you procured any other papers to be sent to Mr. Zeckendorf?

A. Yes, sir; I wrote a letter making a demand upon him to dismiss those suits which he brought in San Francisco; that I would faithfully comply with all the conditions of that contract; it is this letter which is in evidence, attached to the affidavit of Mr. Harrison which was read here.

Mr. Zeckendorf did not make any reply to that up to the time of the stockholders' meeting or after the stockholders' meeting. At no time did I ever receive any reply. Mr. Zeckendorf never orally said anything to me prior to the stockholders' meeting with respect to that demand.

Mr. IVES:

Q. Please state what your purpose or intention with respect to the contract of May 20th, 1903, when you made that demand on Mr. Zeckendorf?

A. It was my intention that if Mr. Zeckendorf failed to comply with my demand and dismiss those suits, to call a stock-
169 holders' meeting and take such action as was necessary to annul and rescind that contract, just as prayed for in the complaint.

Mr. IVES:

Q. In your last answer, to what complaint do you refer?

A. Why, the complaint of Mr. Zeckendorf filed in San Francisco in the injunction suit.

Copy of the agreement of May 20, 1903, was sent to Louis Zeckendorf on December 19, 1903, as shown by the undisputed testimony.

A notice of a stockholders' meeting of the Silver Bell Copper Company to be held on December 26, 1903, was served on Louis Zeckendorf in Tucson, Arizona, on the same day.

The letter from Albert Steinfeld to Louis Zeckendorf making a demand upon Zeckendorf to dismiss the suits pending in San Francisco was served on Louis Zeckendorf on the next day, to wit, December 20th, 1903, and is in words and figures as follows, to wit:

DECEMBER 20, 1904.

Albert Steinfeld to L. Zeckendorf:

I hereby demand the immediate dismissal of the injunction suit instituted by you in the superior court of San Francisco, State of California, against me, the Bank of California, Silver Bell
170 Copper Company and others, and I will comply fully and faithfully with the terms of the contract existing between me and the Silver Bell Copper Company, a copy of which was given you on Saturday, December 19, 1903, and bearing date 20th of May, 1903.

ALBERT STEINFELD testified at the trial as follows:

When I came back from San Francisco before this stockholders' meeting of December 26th, 1903, I said to Mr. Shelton, "this share of stock standing in your name, I desire you to own it unconditionally." I did not ask him for any pay and he did not pay me anything for it and never has. He had performed many services outside of his employment and I desired to give him this share of stock. I don't remember—Mr. Ives told me to do that or not. I won't say definitely whether he did or did not. I don't remember that he formulated that statement for me to make to Mr. Shelton. Mr. Ives was acting as my attorney at that time.

Mr. HENEY:

I advised him in San Francisco myself, to give Mr. Shelton that share of stock so that there would be no question about there being dummy stockholders, and so that he would be able to act independently.

ALBERT STEINFELD at the trial, testified as follows:

171 "The first time that I was advised that under the facts and those options I did not hold this stock or those mines as a trustee, if I remember right, was when you (Mr. Ives) informed me yourself, in San Francisco. That was in December, 1903. Mr. Heney also so advised me. Before Mr. Heney and Mr. Ives advised me to that effect I made a full statement of these facts to them."

ALBERT STEINFELD testified at the trial as follows:
"One of these letters to Mr. Zeckendorf which is in evidence, refers to a coffee deal which he had made, and suggests that the firm could probably use some of it. That was not a deal on behalf of L. Zeckendorf & Co. That was Mr. Zeckendorf's personal deal. I had no interest in it. I remember the occasion of the receipt of a

letter from Mr. Gage after May 20th, 1903, and prior to November or prior to December 1st, 1903, relating to a man named Smith or Miltenberg.

I am referring to the transaction about which Louis Zeckendorf testified.

I received a letter from Mr. Gage enclosing to me a letter of Superintendent Percy Williams, the superintendent of the Imperial Copper Company. In this letter Mr. Williams stated that one Smith, was doing the assessment work on what was known as the
 172 Imperial claim, he claiming that that was a part of his mine and enclosing a sketch of the mine which was claimed by Smith. This Smith was working on what was known as the Miltenberg claim. They were interested together, but I don't know exactly what their relations were. The Imperial mine was one of the mines which I had guaranteed and I showed Mr. Zeckendorf that letter.

This was after my conversation with him in regard to distributing the funds of the corporation. We had several conversations about this matter, it had been discussed pretty freely. I told Mr. Zeckendorf that I knew something about the merits of the case and it did not amount to very much and that matters could be easily adjusted. Mr. Curtis had explained to me how these lines run and I did not anticipate any difficulty. At the same time it was a matter we had to give attention to as it was a conflict against one of the claims the title to which I had guaranteed. Mr. Zeckendorf asked me what that Imperial claim was and where it originated. I told him it was one of the claims which I had purchased and he made the remark that if that was so, he had nothing to do with it. So far as the Silver Bell Company was concerned it was a matter of mine. I told
 173 him it was very strange that he should take that position because the Silver Bell Copper Company was receiving the proceeds of the sale and I could — see why I should be held personally in the event of such conditions coming up under the terms of my guarantee."

This throws light upon the attitude which Louis Zeckendorf was prepared to take in the event that Steinfeld suffered any serious financial loss on account of his individual guarantee of the title to any of the claims constituting the English group of mines, and such knowledge on the part of Steinfeld was sufficient to deter him from consenting to a rescission of the agreement of May 20, 1903 without any obligation from Louis Zeckendorf to protect him against any such loss to the extent of Zeckendorf's interest in the proceeds.

STEINFELD testified at the trial, as follows:

"Q. I hand you what purports to be a certificate of deposit of L. Zeckendorf and Company, bankers, dated December 26th, 1903. Whose signature does it bear?

A. L. Zeckendorf and Company. I wrote it on December 21, 1903. I gave it to Mr. Curtis for the sum of \$18,000. I gave it to him on the 26th day of December, 1903, to go with the check for \$117. I told him what it was for at that time. It was a payment,

174 according to that rescission contract; in payment of the money in accordance with that rescission; I mean the money that was paid to me by the Silver Bell Copper Company, May 1903, which I returned, and for the mines in my name and in the name of the Mammoth Copper Company.

Mr. HENEY: We will offer that certificate of deposit in evidence to go with the check.

At the time I gave Mr. Curtis that I didn't request him not to present it to L. Zeckendorf and Company for payment or to deposit it in the bank. There was no talk between us on the subject. At that time I had a deposit with L. Zeckendorf and Company, the amount of \$18,000, belonging to me personally."

The District Court found at each trial, "that on the 26th day of December, 1903, after the adjournment of the stockholders and directors' meetings, held on said day, said Albert Steinfeld paid to J. N. Curtis, treasurer of the said Silver Bell Copper Company the sum of \$18,117."

The District Court also found on each trial, as follows:

"On the 26th day of December, 1903, and prior to the said stockholders' meeting, the said Steinfeld turned over to the said J. N. Curtis, treasurer of the said Silver Bell Copper Company, all 175 funds in his hands belonging to the said company except the sum of \$51,500.00 which had been garnisheed in his hands in a suit pending against the said company, instituted by one Selim M. Franklin, and except certain money and two promissory notes which had been deposited by him, with the Bank of California in suits instituted by Louis Zeckendorf, and at the same time the said Steinfeld delivered to the said treasurer of the said corporation an order upon the Bank of California authorizing and requiring the said Bank to deliver to the said corporation or its duly authorized officer the said money, and notes so deposited by him as aforesaid, and the same were, after December 26th, 1903, and prior to January 10th, 1904, delivered and turned over by said bank to the said treasurer of the said Silver Bell Copper Company, with the knowledge, assistance and consent of said Albert Steinfeld."

J. N. CURTIS, testified on the trial, as follows:

"Judge Barnes had an option on those properties prior to December, 1900, for \$150,000. I know what we were holding that group of mines for after December 1900. The whole group taken as one group. The price put on the mines after the first of January, 1901, was from five hundred thousand dollars to seven hundred and fifty thousand dollars for the whole group. * * *

176 Q. Now, Mr. Curtis, when was the first time that you and Mr. Steinfeld discussed the division of that money?

A. The first time we discussed the division of the money?

Q. Yes.

A. After the rescission of the vote of the stockholders' meeting rescinding the contract.

Q. After the directors' meeting that same day?

A. No.

Q. Did you discuss it with him between the stockholders' meeting and the directors' meeting?

A. First of all, Mr. Steinfeld gave me back \$18,000.

Q. Answer my question. Did you discuss that matter between the adjournment of that stockholders' meeting and the convening of the directors' meeting?

A. I don't remember.

Q. Do you think that you did?

A. I don't remember. I don't think that I did.

Q. Now, when did he give you that \$18,117?

A. Right after the stockholders' meeting.

Q. Before the convening of the directors' meeting?

A. No, I don't think it was; it was after.

Q. What was the first thing said to you about paying you back any money?

A. The first said back, what—

177 Q. Was that the first thing said to you about his paying you back any money, and why did he say he was paying you as president \$18,117; what did he say?

A. The stockholders' meeting had rescinded this thing for him to pay us back this money.

Q. Did the stockholders' meeting say one word about \$18,000?

A. Rescinded the contract.

Q. Who told you that had the effect of rescinding the contract, Mr. Ives?

A. That is the way I understood it myself.

Q. Is that what Mr. Ives told you?

A. I don't know who told me, whether it was Mr. Ives or not, that is the way I understood it. * * *

Q. Did you, as president of the Silver Bell Copper Company, knowing that Mr. Shelton had but one share of stock in his name, suggest to him that you take independent advice or consult as to what your obligations were to Louis Zeckendorf?

A. No, I did not think it was necessary after the stockholders' meeting.

Q. Who told you what the effect of the stockholders' meeting was?

A. Well, sir, I construed it as a director, I was trustee, and when the stockholders had voted every share of the stock to rescind that contract, I construed that as an instruction from the stockholders to do likewise. * * *

Q. Did he tell you at that meeting, or before that meeting, that the effect of the resolution would be to deprive you or Mr. Zeckendorf of any money?

A. No, I don't remember that he did.

Q. Did you, at the time of this stockholders' meeting was being held, have any such idea that it would deprive you or Mr. Zeckendorf of any money?

A. I knew it would deprive him.

Q. Why didn't you, a director of the Silver Bell Copper Company

in attendance upon that meeting, make some suggestion before that resolution was adopted?

A. As I already stated, I had been charged with fraud in participation in this business.

Q. And that made you feel pretty mean against Mr. Zeckendorf?

A. I felt pretty bad.

Q. And you were willing to sacrifice your obligations to the corporation—

A. I thought it was very mean in Mr. Zeckendorf after all the years I had worked for him and the thousands of dollars I had made for him, to turn around and charge me with fraud. It was uncalled for. * * *

Q. Now, Mr. Curtis, you didn't leave Mr. Ives' office at all after the adjournment of the stockholders' meeting before you held your directors' meeting?

A. The directors' meeting was held shortly after, right in the same place.

And this set of resolutions which now appears in that book was passed before I left Mr. Ives' office." * * *

79 "My feeling toward Louis Zeckendorf at the time did not have any influence in causing me to vote for the resolution of the board of directors, entered into on January 16th, 1904, with Albert Steinfeld, whereby he was to have one-half of the net proceeds of the sale of that group of mines, at the directors' meeting."

LOUIS ZECKENDORF testified at the trial as follows:

So I went in the office one day and said look here, Albert—

I had no Uncle Louis to educate me, but I tell you one thing, anybody who takes me for a fool is badly left. My interest in that Silver Bell is equal to yours, isn't it; he says, yes. Now, I want to know why you keep \$160,000 in your possession and I have no benefit of it; tell you what I do; you take half the money, the half due to you and I take half of my money and we pay all our debts; that is business. Well he said, I tell you, I have specific arrangement with the company. I say, what do you mean, who is the company, you and Curtis; he said, yes; well, I said, you can't deal with yourself. Well, I said I have never taken any legal advice about it, but common sense tells you you can't deal with yourself, and I want to meet you, and the next payment you arrange it that I get \$50,000 out of the next payment, the next note, three months later you arrange for me to get \$25,000 and the next \$25,000 more on account. Well, he says, I have got to see my lawyer, and his lawyer was out of town, so he told me. So then I went and saw things were going on in a that way, could not get any satisfaction, could not get any books. I went to San Francisco, I had heard that Mr. or rather Senator Ives, Honorable, and Mr. Steinfeld had made a trip to San Francisco. I had written a letter to the Bank of California which had at that time the three notes, and one of them recently paid a hundred thousand dollars and something. I telegraphed them not to turn that money over to Steinfeld; that a large portion of that money was mine. In the meantime I engaged

Judge Barnes who wrote a letter to the bank not to pay out this money to Steinfeld. I went to San Francisco the day after.

The paper headed Louis Zeckendorf against Albert Steinfeld, the complaint in my case brought in San Francisco was the paper which Senator Ives then had in his hands at that meeting. He had another paper in his hands at that time so far as I know. He had a copy of an agreement, which he wanted to paste in the minute book.

That is a copy that is pasted in the minute book. I didn't see any other document.

181 In the Superior Court of the City and County of San Francisco, State of California.

LOUIS ZECKENDORF, Plaintiff,
versus

ALBERT STEINFELD, BANK OF CALIFORNIA, a Corporation; SILVER Bell Copper Company, a Corporation; J. N. Curtis and R. K. Shelton, Defendants.

Complaint.

Plaintiff complaining of the Defendant, avers:

I.

That at all of the times herein mentioned, defendant Bank of California was, and it ever since has been a corporation organized and existing under the laws of the State of California.

II.

That at all times herein mentioned, defendant, Silver Bell Copper Company was, and it ever since has been a corporation organized and existing under the laws of the Territory of Arizona, with a capital of 1,000 shares of the par value of twenty-five (\$25) dollars each, of which seven hundred shares are outstanding, that the remaining 300 shares belong to the corporation and are registered upon its stock books in the name of defendant Steinfeld as trustee.

That the plaintiff is the owner of 250 shares of said stock; that the board of said company consists of three directors; namely
182 Defendants Steinfeld, Curtis and Shelton. That but one share of stock is registered in the name of said Shelton, and that said Steinfeld claims to be, and plaintiff alleges him to be the owner of said one share. That at all the times herein mentioned said Curtis was president and said Shelton secretary of said Silver Bell Copper Company, and they still are such president and secretary.

III.

On information and belief that heretofore said Silver Bell Copper Company agreed to sell to the Imperial Copper Company, an Arizona corporation, and said Imperial Copper Company agreed to buy from

said Silver Bell Copper Company, the mines and other property of said Silver Bell Copper Company for the sum of five hundred and fifteen thousand dollars (\$515,000) whereof one hundred and fifteen thousand dollars (\$115,000) was paid in cash to said Steinfeld at the time of making said agreement and for the balance whereof said Imperial Copper Company delivered to said Steinfeld its four (4) promissory notes, each dated May 20th, 1903, each calling for the payment of one hundred thousand dollars (\$100,000) with interest from said date at the rate of six (6) per cent per annum; that said notes were made payable three, six and nine and 12 months after date respectively; that the name of the payee in all of said notes was left blank, but said notes were delivered by said Imperial Copper Company to said Steinfeld; that thereupon a deed conveying the properties of said Silver Bell Copper Company was placed in escrow, to be delivered to said Imperial Copper Company upon the payment of all of said notes.

IV.

That in addition to said one hundred and fifteen thousand dollars (\$115,000) cash, said Steinfeld has received the proceeds of the two said notes first maturing; namely, \$101,500 and \$103,000. That said Steinfeld has placed a large sum of money, part of the proceeds said notes (the amount whereof is at least \$50,000) and the two said notes maturing respectively February 20, 1904, and May 20, 1904, with defendant Bank of California to his individual credit. That said Steinfeld has in his own name for his own benefit, expended out a large part of the balance of said moneys already collected under said notes. That said Steinfeld claims the right to hold the moneys so collected and the notes now in the said Bank of California as against said Silver Bell Copper Company and the officers and the shareholders thereof and has demanded from said bank the payment of said moneys and the surrender of said notes: and the said Steinfeld bases his said claim to hold said moneys and said notes for his own account, upon alleged resolutions attempted to be passed by the board of directors of said Silver Bell Copper Company, which pretended resolutions purport to authorize the execution of some agreement or agreements between said Silver Bell Copper Company and said Steinfeld. The said pretended resolutions do not set forth the terms of said agreements, and neither the said agreements or the substance thereof is set out in the minutes of said board except as follows:

Resolved, that the agreement this day made by the president and secretary of this corporation with the Mammoth Copper Company and Albert Steinfeld in regard to the disposition of the proceeds of the sale this day made to the Imperial Copper Company, and indemnifying said Steinfeld, be and the same is hereby ratified, approved and confirmed," and except that there appears in said minutes the following resolution:

Resolved, that the president and secretary of this company be, and they are hereby authorized, empowered and directed, in such man-

ner and form as they deem necessary or proper, to indemnify said
Albert Steinfeld against all loss, damage and expense that
185 may arise to him by reason of his having guaranteed the
titles to the property or sold or agreed to be sold to the said
Imperial Copper Company and that he and they hereby are authorized, empowered and directed to do or cause to be done all things and to execute all papers, documents, which they may deem necessary in the premises.

That the said pretended resolutions are void and of no effect as against said Silver Bell Copper Company or its shareholders or at all, in that said Steinfeld joined in the vote therefor, and that the other two directors are in the employ of said Steinfeld and wholly under his control, and in that said Shelton does not own any shares of said corporation; and in that they were pretended to be adopted at the instigation of said Steinfeld, and as a part of a scheme on his part to defraud said company and its shareholders. And plaintiff expressly avers that said two other directors and defendants, Curtis and Shelton, then and always were, and still are acting solely in the interest of, and are under the complete control and domination of said Steinfeld, and blindly and without consideration of the interests of said corporation, carry out all of his directions. That they are disregardful of the interests of the corporation as against the interests of said Steinfeld.

186

V.

That it would be a futile and vain proceeding for this plaintiff to demand of said board of directors to take proceedings on behalf of said Silver Bell Copper Company against said Steinfeld to recover the moneys and notes so wrongfully withheld by him and which he claims to have the right to hold as against said corporation, or to rescind said last mentioned agreements or resolutions, because said directors and defendants, Curtis and Shelton, are acting solely in the interests of and under the sole control of said Steinfeld, and would continue so to be even if informed of the injurious effect of their actions, and would yield to his influence and control even if informed of the purposes and uses for which that influence is exercised.

That the offices of said Silver Bell Copper Company is in Tucson, Arizona Territory, and said defendants, Curtis, Shelton now are, and they reside in the Territory of Arizona, but the minute book of said corporation was sent out of said Territory. That said Steinfeld has in his possession exclusive of said funds and notes in said Bank of California, ample funds to protect him against any possible liability which he may have incurred on behalf of or with reference to said Silver Bell Copper Company or the guaranty of titles to property sold by it or otherwise.

187

VI.

The said Steinfeld resides in said Tucson, and has demanded from said Bank of California, the surrender of said moneys and notes in its possession, and threatens to bring proceedings against the said

ank for withholding of same. That unless said Steinfeld and said ank of California be restrained and Steinfeld will obtain possession of said moneys and notes in said Bank of California, and remove them from the State and the jurisdiction of this court, and the same will be in danger of being lost to said Silver Bell Copper Company and to its shareholders. That prior to the commencement of this action, plaintiff offered said Steinfeld to refrain from these proceedings if said Steinfeld would agree to allow said money and said notes or the proceeds thereof, to remain in said Bank of California or other bank of approved standing, for the benefit of said Silver Bell Copper Company, and for the protection of said Steinfeld against any liability incurred by him for the benefit of said Silver Bell Copper Company, or if said Steinfeld would furnish a sufficient bond in favor of said Silver Bell Copper Company to faithfully account for said moneys and said notes in said Bank of California, but each of said propositions has been rejected by said Steinfeld; that plaintiff has also requested of said Steinfeld that plaintiff in view of his large interest in said corporation, be elected a director thereof, but said Steinfeld has also refused said request. And plaintiff further avers information and belief, that said Steinfeld has caused a collusive suit to be brought against the Silver Bell Copper Company for fifty thousand (\$50,000), and a collusive garnishment to issue therein, and said Steinfeld has more than sufficient funds belonging to said company and in his possession, exclusive of the funds and notes in said Bank of California, to cover the amount of said garnishment. That this suit is brought for the benefit of said Silver Bell Copper Company and of all the shareholders thereof, and because as aforesaid, it would be futile and impracticable to demand of the board of directors of said corporation that action be taken by it against said Steinfeld, or to secure any of the relief herein prayed for.

VIII.

That said Steinfeld is not financially responsible to the extent of the amount of moneys and notes so withheld by him, and plaintiff has no adequate remedy at law. That if said Steinfeld be allowed to withdraw said moneys and said notes from said Bank of California, said Silver Bell Copper Company and its stockholders will suffer irreparable loss and any judgment rendered herein against said Steinfeld will be wholly ineffectual.

Wherefore, plaintiff prays,

1. That a receiver be appointed to hold said moneys and notes in said Bank of California, for the benefit of the said Silver Bell Copper Company, during the pendency of this suit.

That an injunction issue restraining said Steinfeld from removing and said Bank of California from delivering to him said moneys or said notes now in the custody of said Bank of California. That said Steinfeld be required to set forth that nature of his claim to said moneys and said notes, and the terms of the agreement referred to in said resolutions, and to account to said Silver

Bell Copper Company for moneys received or that may hereafter be received by him belonging to said corporation.

4. That said resolutions and the agreements therein referred to be declared null and void.

5. And that the plaintiff have such other and further relief as may be just in the premises, together with the cost of this suit.

JESSE W. LILIENTHAL,
Attorney for Plaintiff.

STATE OF CALIFORNIA,
City and County of San Francisco, ss:

Louis Zeckendorf, being duly sworn, deposes and says: That he is the plaintiff in the above entitled action. That he has read
190 the above and foregoing complaint and knows the contents thereof; that the same is true of his own knowledge except as to the matters which are therein stated on his information or belief; and as to those matters, that he believes it to be true.

LOUIS ZECKENDORF.

Subscribed and sworn before me, this 8th day of December, 1903.

[SEAL.]

ALFRED A. ENQUIST,
*Notary Public in and for said City and County of
San Francisco, State of California.*

Louis Zeckendorf testified on trial as follows:

"When I came back from the mine, or before I went to the mine in February, 1901, I examined the books of L. Zeckendorf and Company, in a way. Most likely I examined the account of the Silver Bell Copper Company with L. Zeckendorf and Company. I think I remember doing so.

Q. Did you find any charge there for the mines that had been purchased—for the mining claims that had been purchased by Mr. Steinfeld?

A. I didn't go into the details of the account.

Q. You went into it far enough to make you very nervous about the large amount of indebtedness, did you not?

191 A. Well, sometimes it does make a man nervous.

The firm of L. Zeckendorf and Company was never organized for the purpose of engaging in mining speculations and enterprises. I did not think that it was a good business at all for Steinfeld as the managing partner of L. Zeckendorf and Company to admit of such a large indebtedness being incurred in the mining business and I told him so.

I told Mr. Steinfeld that I thought it was bad business for him as managing partner of L. Zeckendorf and Company to permit such a large indebtedness to be incurred in a mining venture. I might have told him. I didn't think it was conservative enough for our business. I did not object to such a large indebtedness, the objection came from him.

Q. You never objected at all to the amount of the debt?

A. He always wrote me that it was a mistake to invest so much

money in outside business and that we ought not do it, the business would not stand it. When we went into the Old Boot, Mr. Curtis and Mr. Steinfeld reported to me that if we had the Old Boot the property would take care of itself. Then the Silver Bell Company and the Nielsen Mining Company owed us about \$18,000 in a round sum, probably \$20,000. I was assured by Mr. Curtis that the mine would surely take care of itself and that it would not be necessary for us to make any further advances, and that the mine would earn enough dividends to take care of itself, then as a matter of course, that account crawled up from \$20,000 to \$100,000 and I was surprised at it.

LOUIS ZECKENDORF testified as follows on the trial:

"Before I went to San Francisco I engaged Judge Barnes and I showed him our partnership contract and I explained everything to him, and I told him that I wanted to secure the money in the Bank of California so that Mr. Steinfeld could not draw it." * * *

"As I have said before, when we talked about the Silver Bell I only thought of the Old Boot; the other mines I did not think anything of. I looked upon them as mere prospects." * * *

"I received a letter from Mr. Steinfeld just before he went to Europe telling me he was going there to try and get these English mines. I had several letters from him telling me that he thought it was very important to get them. When he came back I had a talk with him. I know that the Silver Bell Copper Company was largely indebted to the firm. I did not ask him anything about whether he got the English mines or not." * * *

The District Court found that "said Steinfeld returned from Europe after concluding the purchase of the English titles to said English group of mines, he advised and told plaintiff that he had purchased the same."

The District Court found in relation to the resolution rescinding the agreement of May 20th, 1903, which was unanimously adopted at the stockholders' meeting on December 26, 1903, that "said resolution so passed at said stockholders' meeting was not procured by false representation, misconduct or fraudulent practices."

The District Court also found:

"That Albert Steinfeld did not at any time prior to the purchase from the English owners of their title to the English group of mines make any direct or express promise or representation to the Nielsen Mining & Smelting Company or the Silver Bell Copper Company or to any officer or director of said company, that he would purchase as agent or representative of said company or otherwise, the Francis and Volkert titles to the English group of mines for the use or benefit of the said company."

Upon the second trial on exactly the same evidence the District Court refused to make any finding whatever upon this point.

That at the stockholders' meeting on December 26, 1903, Eugene S. Ives, as attorney for Steinfeld, held in his hand copy of the complaint of Louis Zeckendorf in the injunction suit

in San Francisco to procure a re-cission of the agreement of May 20, 1903 and read from the prayer thereof in announcing the different things which Steinfeld had done and proposed to do.

The District Court made the following finding of fact on the second trial of this case, to wit:

That on the 26th day of December, 1903 and prior to the said stockholders' meeting, the said Steinfeld turned over to the said J. N. Curtis, treasurer of the said Silver Bell Copper Company, all funds in his hands belonging to said Company except the sum of \$51,500 which had been garnisheed in his hands in a suit pending against the said Company, instituted by one Selim M. Franklin, and except cer- money and two promissory notes which had been deposited by him with the Bank of California in suits instituted by Louis Zeckendorf, and at the same time the said Steinfeld delivered to the said Treasurer of the said corporation an order upon the Bank of California, authorizing and requiring the said Bank to deliver to the said corporation or its duly authorized officer the said 195 money and notes so deposited by them as aforesaid, and the same were, after December 26, 1903 and prior to Jan. 10, 1904 delivered and turned over by said Bank to the said Treasurer of the said Silver Bell Copper Company, with the knowledge, assistance and consent of said Albert Steinfeld. That on the 9th day of January, 1904, said Albert Steinfeld gave to Francis and Volkert the sum of \$12,700."

Just at the close of the stockholders' meeting on December 26, 1903 the following occurred, as shown by the evidence at the trial.

Judge BARNES: Wait a minute; I understood that these 300 shares acquired from Mrs. Nielsen on which there is payable some \$10,000 is the property of the company.

Mr. IVES: That is a matter we won't discuss. We won't discuss anything whatever, until those suits are dismissed.

Judge BARNES: Mr. Zeckendorf claims, and will claim, if the difficulty goes on that those 300 shares belong to L. Zeckendorf & Co., but he is willing to state that they belong to the corporation; he is willing that Mr. Curtis shall have the benefit of that proportion, but we want to know which it is.

Mr. IVES: That is a matter the stockholders have nothing to do with.

196 The foregoing action and statement on part of Judge Barnes in behalf of Louis Zeckendorf shows that Barnes clearly understood at the time that the rescinding of the agreement of May 20th, 1903 could not leave the question of the ownership of the 300 shares of Nielsen stock open to contention and it necessarily follows that he must have understood that it also left the question of the ownership of the English group of mines prior to the execution of the agreement of May 20th, 1903 likewise open to contention.

The statement of Judge Barnes that "if the difficulty goes on" Mr. Zeckendorf would claim that the 300 shares belonged to L. Zeckendorf & Company, is conclusive evidence of the fact that Barnes anticipated further difficulty between Zeckendorf and Steinfeld grow-

out of the rescinding of the agreement of May 20th, 1903, and the action of Louis Zeckendorf in refusing to dismiss his stockholders' suit in San Francisco to rescind the agreement of May 20, 1903 is very significant.

The statement by Ives "that is a matter we won't discuss. We won't discuss anything whatever until those suits are dismissed," referring to the suits in San Francisco) is likewise very significant.

7 If Louis Zeckendorf at any time prior to Jan. 16, 1904 had shown a disposition to deal fairly with Albert Steinfeld dismissing his suits against Steinfeld in San Francisco and by setting Steinfeld in the eyes of the public and in the eyes of the Bank of California, from whom Steinfeld naturally expected to secure credit in his mercantile business after his partnership with Zeckendorf should be dissolved, it is obvious that Steinfeld might have refrained from claiming his legal right to so much of the proceeds of the sale of the joint groups of mines as he might be entitled to as the individual owner of the English group. The intention of the parties to rescind every part of the agreement of May 20, 1903 by their action at the stockholders' meeting December 26, 1903, cannot be open to doubt when viewed in the light of all this evidence.

It is obvious that Steinfeld proceeded under the advice of his attorneys, Ives and Heney, from the time the proposed compromise in San Francisco was declared off, and that it was his deliberate and known purpose to acquiesce in the action of Louis Zeckendorf to secure a rescission of the agreement of May 20, 1903. The stockholders' meeting was plainly a shorter and quicker route by which to secure justice and complete the rescission of the agreement of May 20, 1903, than could or would have been achieved if Steinfeld had confessed judgment in the action which Louis Zeckendorf had previously commenced against him in San Francisco for the very purpose of securing the complete rescission of the contract of May 20th, 1903.

ALBERT STEINFELD testified as follows, relating to the purchase of stock of Wm. Zeckendorf:

Now, Mr. Steinfeld there is evidence that after the commencement of his action and in the month of January, 1904, you purchased stock of William Zeckendorf. Please state how you arrived at the figures in brief of the purchase price of that stock and why you paid that amount of money for such stock?

The figures and statements are already in evidence here. As I was trustee for Mrs. Zeckendorf, I was not represented at this stockholders' meeting and I concluded to purchase his stock upon the basis of what would have been received if there had been no reason.

I purchased 30 shares of stock which I purchased from Wm. Zeckendorf in my name as trustee. I did not vote that stock at the stockholders' meeting.

Letter from Albert Steinfeld to Wm. Zeckendorf, Dated Tucson, June 18, 1904.

199 I enclose herewith memorandum of the account of the purchase price received from the Silver Bell mines as of December, 1903. The sum of \$51,500 was garnisheed in my hands by Selim M. Franklin and that sum of money does not appear upon this account. There is also pending against the company a suit brought by Burnett and others. When these suits are determined I will render you a supplemental account of all expenditures from December, 1903, until the determination of said suits; and if after paying the amounts of any judgments that may be recovered in them and all costs and expenditures of every kind there should be a balance, you will be entitled to your proportion thereof as additional consideration for the thirty shares of stock this day sold to me by yourself and wife.

Yours very truly,

ALBERT STEINFELD.

Memorandum of Account of Purchase Price from Silver Bell Sales.

JUNE 18, 1904.

Total receipts, cash and notes.....	\$527,421.50
Less garnishee, Franklin suit.....	51,500.00
	<hr/>
	\$475,291.50
Total disbursements.....	184,739.77
	<hr/>
	\$291,181.73

1,000 shares \$291.18 per share.
30 shares \$12,479.10.

200 Nineteenth. That said Steinfeld assigned the hereinbefore quoted finding as error on the ground that the same was not sustained by the evidence, and that such assignment of error was urged upon the court as the controlling and paramount issue of such appeal. With respect to such assignment, the Supreme Court of the Territory of Arizona upon the first appeal, said:

Assuming the fact to be sustained by the evidence that the parties to the agreement of May 20, 1903, in rescinding it did not intend thereby to affect all the provisions thereof, but only a part thereof, a question of law is thus presented."

The Court then proceeded to dispose of said question of law as conclusive upon the point. It is obvious, therefore, that the said Supreme Court in passing upon the issues presented upon said appeal, and in rendering judgment reversing the judgment of the District Court, did not deem it necessary to consider, and did not consider whether or not the said finding was sustained by the evidence, and did not consider the evidence hereinabove and in the previous paragraph quoted, insofar as said evidence established the intent of

the parties at said stockholders' meeting; and that the said Supreme Court did then and there determine it to be the law of the case insofar as the Territory of Arizona was concerned, that the question of the intent of the parties of the stockholders' meeting in voting for the said resolution to rescind, and of the officers and directors of the said corporation in ordering and effecting such rescission was immaterial to any of the issues of the said action.

Twentieth. That upon the second trial of the said action the parties by stipulation, submitted the cause upon the same evidence which was adduced upon the first trial, with the exception that certain evidence as to the proportionate value of the English group of mines was withdrawn; that the said Steinfeld in so stipulating, was influenced by and relied upon, and was advised, and believed, and had the right to rely upon the fact that the aforesaid intent of the stockholders, directors and officers of the Silver Bell Copper Company as hereinbefore set forth, was immaterial.

That after the conclusion of the said trial, the judge who presided hereat, to the surprise of the said Steinfeld, and notwithstanding the aforesaid opinion of the Supreme Court of the Territory of Arizona, that such intent was immaterial and notwithstanding that he had upon the same evidence found that there was no fraud or concealment, as hereinbefore set forth, did make and file a certain finding (being finding XXXII); that said finding consists of a stenographer's minutes of said stockholders' meeting, which is a portion of the evidence upon the said question of intent, and of no other evidence bearing thereupon; and of the following conclusion of the said Judge:

"That in the stockholders' meeting held on the 26th day of December, 1903, hereinabove set out, plaintiff in voting to rescind said agreement of May 20th, 1903, and the resolution hereinabove mentioned, did not understand or know or believe that anybody claimed or would claim that the action taken on that day by the stockholders of the Silver Bell Copper Company, would operate to give either Albert Steinfeld or the Mammoth Copper Company any right or claim to any of said proceeds of said sale, nor did the directors in good faith understand or believe that the stockholders intended to instruct them to rescind any portion of the agreement and resolution other than that relating to the indemnity agreement hereinbefore mentioned.

That had the said Steinfeld known or believed or had reason to know or believe that the said Judge would deem the said intent material, or would consider himself authorized in view of such decision of the Supreme Court of the Territory to make any finding on the question of such intent, said Steinfeld could have availed himself of his opportunity and right to offer in addition to the evidence hereinabove set forth, further evidence upon the question of the said intent; and the said Steinfeld verily believes, and hereby alleges and avers, that the said Zeckendorf in voting at said stockholders' meeting for the rescission of the said contract, intended with deliberation to vote for the rescission of such contract *toto* and without reservation or qualification of any kind; and

furthermore alleges and avers by reason of his familiarity with the various proceedings and transactions leading up to such rescission, and of the letters from Zeckendorf to himself, and of the statements made to said Lilienthal by Ives as hereinabove set forth, that the said Zeckendorf himself would, upon cross examination, testify that he intended when he cast said vote, at said stockholders' meeting to rescind the said contracts in toto and to testify that the time he cast said vote, he had been advised and believed that the said Steinfeld had always held the said English group of mines in trust for the Silver Bell Copper Company, and that the ownership of the

204 Silver Bell Copper Company in the entire proceeds of the entire mine was due to the fact that Steinfeld held said English group only as trustee for the Silver Bell Copper Company, and was not in any sense established or affected by the agreement of May 20, 1903, and that therefore, the ownership of the said proceeds always had been and would continue to be vested in the said Silver Bell Copper Company without respect to whether the said contract was rescinded or not; and that the said Zeckendorf furthermore believed that the said Steinfeld was not entitled to the full sum of \$18,117 paid by the said Silver Bell Copper Company to the said Steinfeld for the said English group of mines, for the reason, as believed by said Zeckendorf, that the said Steinfeld purchased the said mines as Trustee for the Silver Bell Copper Company, and could not charge the said company for said mines more than the actual cost thereof, with interest at the rate of six per cent per annum.

Whereas, as a matter of fact said \$18,117 contained as was communicated to the said Zeckendorf by the said Steinfeld, not only the cost of said mines, but also the expense of a trip to Europe of the said Steinfeld and his son, and all interest upon all of said

205 amounts, including the expense of the said trip, at the rate of one per cent per month, and that said Zeckendorf therefore was prompted to vote for said rescission because he believed and expected that by virtue of such rescission the company would recover from said Steinfeld a considerable portion of said \$18,117; would regain the custody of the money and notes; would be released from obligations assumed by Steinfeld, and would moreover reap such advantages and nevertheless retain the entire proceeds by reason of the fact that at all times the Silver Bell Copper Company had been the beneficial owner thereof.

Twenty-first. That upon the rendition of judgment at the conclusion of said second trial in favor of the said Steinfeld upon said first cause of action, said Zeckendorf made his motion for a new trial, but that he did not move upon the findings for a judgment other or different from that which was rendered by the court; that the said motion for a new trial was denied, and the said Zeckendorf thereupon appealed to the Supreme Court of the Territory of Arizona from the said judgment, and from the order denying the motion for a new trial; that upon said appeal, the said Zeckendorf duly assigned certain rulings and actions of the court upon the trial

206 as error: that all of such assignments of error were directed to the question of whether Steinfeld at all times held the English group of mines as trustee for the Silver Bell Copper

Company, and that there was no assignment of error directed to the question of the validity or effect of the rescission of the said contract of May 20, 1903; that under the rules and decisions of the Supreme Court of the Territory of Arizona then, and for many years prior thereto, in force, the said Supreme Court of the Territory had no power or jurisdiction upon said appeal to consider or pass upon any matters or things or rulings or orders, which were not assigned as error, and that therefore, the said Supreme Court of the Territory upon said appeal of said Zeckendorf had no power to pass upon the question as to whether or not the said contract of May 20, 1903, had or had not been rescinded in full.

That said Steinfeld did assign as error to the Supreme Court of the Territory of Arizona, among other findings that part of said finding XXXII, hereinabove quoted, as not being supported by the evidence.

That the Supreme Court as aforesaid under its said rules and decisions, had no power or authority to consider any matter not raised by the assignments of error of the appellant, and in as much
207 as the said appellant, Zeckendorf, did not assign as error any matter affecting the validity of said rescission, the said Supreme Court had no power or authority to consider such question of rescission, and therefore could not consider the said assignment of error of Steinfeld; that said finding XXXII was not sustained by the evidence, and as Steinfeld verily believes, and as hereinafter stated can prove, did not consider or pass upon said part of said finding and regarded and treated it as altogether and entirely immaterial to any issue presented upon the appeal; and that it so appears by the opinion of the said Supreme Court of the Territory upon such second appeal, wherein said part of said finding and all matters appertaining thereto were wholly ignored.

Twenty-second. That shortly after the rendition of the judgment of the Supreme Court of the Territory upon said second appeal, and long prior to the signing or filing of the alleged statement of facts in the nature of a special verdict, thereafter filed and remitted to the United States Supreme Court, two of the Judges of the Supreme Court who had participated in the hearing and decisions upon the said second appeal, resigned from the said Supreme Court, and that
208 for a considerable period prior to the filing of said alleged statement of facts, and at the time thereof, the five Judges of the said Supreme Court consisted of Hon. John H. Campbell, who tried the case in the District Court, and who was disqualified to act upon such appeal; the Hon. Edward Kent, Chief Justice; the Hon. Fletcher M. Doan, Associate Justice, both of whom had participated in the said appeal; and Hon. George W. Lewis and Edward M. Doe, Associate Justices of the Supreme Court, both of whom had been appointed to the Supreme Court long after the rendition of the judgment upon the said second appeal. That said Steinfeld is informed by his attorneys and believes and therefore alleges that the said Associate Justices Lewis and Doe knew nothing about the issues in the said case and that neither of said two Justices nor, Justice Doan took any part in the preparation or ap-

proval or making or filing of the said alleged statement of facts, and that he can so prove by their testimony upon this proceeding if this Honorable Court deems it material.

That the said Hon. Edward Kent, Chief Justice, did while in the City of Los Angeles, State of California, sign said alleged statement of facts, and send the same by mail to the Clerk of the Supreme Court of the Territory of Arizona, without consulting
209 with any other member of the said Supreme Court, and merely adopted in said statement so signed and mailed by him, the findings of fact of the District Court as a matter of form, adding thereto one or two sentences from the opinion rendered by the court on said second appeal.

That said Steinfeld verily believes and alleges and offers to prove by the testimony of the said Associate Justices Sloan and Doan that, as a matter of fact, the said Supreme Court of the Territory upon said second appeal, did not consider in any respect the said part of said finding XXXII, or the evidence bearing upon the intent of the stockholders or directors of the Silver Bell Copper Company in the said Stockholders' and Directors' Meetings, and that the said statement of facts so far as the question of the rescission of the said contract of May 20, 1903, is concerned, was a mere formal adoption by the said Chief Justice of the findings of the District Court, made upon the theory that the evidentiary part of said finding as to the discussion at the stockholders' meeting and the last paragraph thereof hereinabove quoted, were under the view of the law adopted by the Supreme Court wholly immaterial and of no consequence, and they were considered so to be by the United States Su-
210 preme Court; and that said Steinfeld verily believes and alleges and avers, upon information and belief, obtained from his attorneys, that the said Justices Sloane, Kent and Doan, who participated in the said hearing, will so say and testify at all times. That the fourth Judge who participated in the said hearing, to wit: Hon. Frederick S. Nave, is now deceased; and that the said Steinfeld does assert that the said statement of facts was made and filed without jurisdiction, by reason of its having been so made by a single member of the Court when out of the Territory of Arizona, and by reason of the various facts and things hereinbefore set forth.

Twenty-third. The said Steinfeld does hereby aver and protest that he has never had an opportunity to have any appellate court review the sufficiency of the said finding No. XXXII and that inasmuch as the opinion of the United States Supreme Court is based upon the said finding, a gross injustice will be committed against him, the said Steinfeld, if final judgment be entered against him without opportunity on his part to have the facts thereby found reviewed. That as heretofore alleged neither the District Court nor the Supreme Court of the Territory under the law of the case established after the judgment of the Supreme Court of the Ter-
211 ritory upon the first appeal, had power to consider the said question, for the reason as hereinbefore expressed, that it had at that time been determined that the said question, though now

by virtue of the United States Supreme Court controlling, was at such time wholly immaterial.

Twenty-fourth. That the said Steinfeld will further prove upon said new trial, or in this proceeding if the Court should so require, that upon the return of the said Steinfeld from San Francisco, as hereinbefore alleged, the said Steinfeld told the said Curtis and Shelton of what had transpired in San Francisco, and that Zeckendorf, through his attorney, Lilienthal as aforesaid, had been notified that Steinfeld intended in the event that Zeckendorf should persist in the said injunction suit, to permit him to rescind the said contract, and then, upon such rescission, to claim as his own, that portion of the proceeds which was the consideration for the English group of mines; and that the said Shelton and Curtis knew from the said Steinfeld, and were advised by the said Steinfeld's attorneys, prior to the said stockholders' meeting, that the said Steinfeld intended in the event Zeckendorf at said stockholders' meeting should refuse to dismiss said injunction suit, and to persist in the rescission of said contract, that Steinfeld would carry out his
212 aforesaid purpose and intent, and make claim to said portion of the proceeds of the sale; and that Curtis and Shelton will so testify.

And Steinfeld further avers that he would have produced such evidence upon the second trial, but for the fact that the Supreme Court of the Territory of Arizona had held that the intent and purpose of the stockholders at said meeting was wholly immaterial.

Twenty-fifth. Said Steinfeld is informed by his attorneys, and believes and alleges, that upon the hearing before the Supreme Court of the State of Arizona, after the receipt by said Court of the mandate of the United States Supreme Court, the question of the effect of the statement of facts in the nature of a special verdict made by the Supreme Court of the Territory of Arizona, was considered, and that Steinfeld's attorneys stated in open court, that the Superior Court might deem itself, if the Supreme Court were silent upon the subject, bound to accept said statement of facts as *res adjudicata*; and that unless the Supreme Court of the State were of the opinion that said statement of facts was binding upon the Superior Court, a great injustice might by such court's silence in the premises, be committed upon said Steinfeld.

213 That thereupon, the said court in open court, authorized the respective attorneys to state to the Superior Court upon any application that might be made to such court, in pursuance of the respective mandates, that the said Supreme Court of the State of Arizona did not pass upon the question as to whether the Superior Court should or should not be bound by the said statement of facts; and the said Steinfeld avers that therefore, upon this hearing, the said statement of facts should not be held as controlling.

Twenty-sixth. That the defendant Steinfeld, duly filed in said District Court a demurrer to said third amended complaint, on the following, among other grounds, to wit:

III.

"That the facts alleged in the first cause of action in said third amended complaint set forth, are not sufficient to constitute a cause of action."

Twenty-seventh. That the Mammoth Copper Company duly filed a separate demurrer to the plaintiff's third amended complaint, on the following, among other grounds, to wit:

III.

"The facts alleged in the first cause of action in said third amended complaint set forth, are not sufficient to constitute a cause of action."

214 Twenty-eighth. That said demurrers were each overruled by the trial court and that its action in so doing was assigned as error by said defendant Steinfeld; and also by the defendant the Mammoth Copper Company on appeal to the Supreme Court of the Territory; and that said assignment of errors were not considered or passed upon by the Supreme Court upon said appeal, for the reason, as shown by the opinion of said court, that the facts found by the trial court were not sufficient to constitute such first cause of action upon either issue contained therein.

Twenty-ninth. That the defendant moved to strike from the third amended complaint upon nine particular grounds, which are specified in said motion to strike, and the Court denied the first, second, fourth, fifth, sixth, seventh and eighth ground- of said motion, to which ruling of the court the defendants, through their counsel, duly excepted.

215

Amount of Judgment.

In the event that this court should, despite the opposition of the defendant, grant plaintiff's motion for judgment, then it is respectfully submitted with respect to the amount of said judgment, as follows:

A. That the attorneys for plaintiff are not entitled to ten per cent of the amount of the judgment recovered in behalf of the Silver Bell Copper Company, but to no more than ten per cent upon the real subject matter of the said first cause of action, the same being approximately the sum of \$80,000.

That while the action is brought nominally in behalf of the Silver Bell Copper Company, it is in truth and reality an action brought by Louis Zeckendorf in behalf of nobody other than himself, and the institution of the said action in behalf of the Silver Bell Copper Company was a form required by law, to the end that the said Zeckendorf might properly present to the court his own claims in the premises.

That it appears by the record, and is undisputed, that all of the stockholders with the exception of Louis Zeckendorf, acquiesced in the rescission of the contract of May 20, 1903, and the distribution of the proceeds of the sale which was made in accordance therewith, whereby Albert Steinfeld received the

216

sum of \$145,743.75, and one note, which, with interest, amounted at the time he received the same to \$104,000. That of such sum approximately \$250,000, Albert Steinfeld would necessarily be credited in the amount of \$18,117 repaid by him to the company upon the rescission of such contract, and the sum of \$12,500 paid by him to Francis and Volkert, amounting together to \$30,617, leaving a balance of approximately \$220,000. That the largest amount which Louis Zeckendorf could claim of such sum would be the sum of \$80,000. That the balance of such sum so received by said Steinfeld belongs to the said Steinfeld, Curtis and Shelton, all defendants in this action, and all of whom, as above stated participated in giving to said Steinfeld the said \$145,000, and the said note, and are barred from claiming any portion of the same; and, as a matter of fact, do not make claim to any portion of the same, as they have alleged in their answers in this action.

That therefore, it would be unjust and unfair for the attorneys for L. Zeckendorf & Co. to receive ten per cent upon the total amount of said moneys, when, as a matter of fact, the subject involved did not exceed at the time of the commencement of this action said sum of \$80,000.

217 B. That neither the plaintiff nor the Silver Bell Copper Company is entitled to interest upon any moneys that may be adjudged in his or its favor by reason of the first cause of action, on the following grounds:

(a) That there is no agreement in writing signed by Albert Steinfeld, providing for the payment of interest upon the claim in such cause of action set forth, and under paragraph 2774 of the Revised Statutes of 1901, in the absence of such an agreement interest is not allowable upon such claim.

(b) That in and by virtue of the agreement of May 20, 1903, Albert Steinfeld, is entitled to the custody of all of the purchase price of the Imperial Copper Company until discharged of all of his liabilities and responsibilities in connection with the transactions whereby the properties of the Silver Bell Copper Company were acquired and sold; and there still remains outstanding a claim in favor of Mary Nielsen as administratrix of the estate of Carl Nielsen, deceased, against the Silver Bell Copper Company and against Albert Steinfeld, which said claim is in litigation and is 218 undetermined, and which may result in establishing the right of said Mary Nielsen to \$150,000 or more of the proceeds of the said sale, and therefore that if this court should refuse to grant a new trial and should direct judgment against said Steinfeld, then said Steinfeld being by virtue of said agreement thus adjudged to be unrescinded and still in force should not be held liable for interest.

Receiver.

That this court should not fix the bond of a receiver as prayed, upon the following grounds:

(a) That no reason exists why a receiver should qualify. That

while the United States Supreme Court has adjudged that the District Court was within its discretion in appointing a Receiver, the reason for such appointment no longer exists, and the court can consistently with the opinion of the United States Supreme Court, either discharge such receiver or leave the matter of his accession to the duties of his office in abeyance.

That none of the stockholders of the Silver Bell Copper Company, other than Louis Zeckendorf, desires the appointment of a receiver, and that there is no duty of any kind for the receiver to perform other than to collect the amount of the judgment upon the
219 second cause of action, and distribute the proceeds among the stockholders; that the qualification of a receiver will entail receiver's expenses and charges, and the expenses and charges of an attorney for the receiver, and would tend unnecessarily to deplete the amounts due and payable to the stockholders.

(b) That in and by virtue of the contract dated June 29, 1900, between Albert Steinfeld and the Nielsen Mining and Smelting Company and the Silver Bell Copper Company of the one part and Carl S. Nielsen and Mary Nielsen, his wife, on the other part, whereby the 300 shares of stock, the subject matter of the second cause of action, acquired by the said Neilsens, the said Steinfeld became personally responsible for the benefit of the Silver Bell Copper Company to the said Carl S. Nielsen, and is now personally responsible to the said Mary Nielsen as administratrix of the estate of Carl S. Nielsen, deceased, and by reason of the fact of the claim of the said Mary Nielsen, as aforesaid, it is not determined whether Louis Zeckendorf has as yet recovered anything in behalf of the corporation by the obtaining of the judgment in the said second cause of action; that the said judgment finally concludes that as
220 between Steinfeld and the Silver Bell Copper Company, the Silver Bell Copper Company is the owner of such 300 shares of stock and of the dividend upon the same heretofore declared; but that it is still at issue and undetermined as to whether said stock and dividend belong to the said Mary Nielsen or to the said Silver Bell Copper Company, and therefore, no division of the said fund covered by the judgment upon the second cause of action may be made until after the determination of the said Nielsen litigation; that the said Steinfeld has given a bond to secure the payment of the said judgment upon the second cause of action, and furthermore is ready and willing, and hereby offers, to give a suitable bond, to be fixed by the court, that upon the determination of said litigation brought by the said Mary Nielsen as aforesaid, he will pay over the amount of such judgment upon the second cause of action either to the said Mary Nielsen or to the Silver Bell Copper Company, as may be adjudged proper. The said Steinfeld also offers to pay forthwith to the said Zeckendorf and to his attorneys the proportion of the amount of the said judgment in said second cause of action due to each of them respectively, provided that said parties will obligate themselves to refund the same to the said Steinfeld in the event that the said Mary Nielsen may not be ad-
221 judged to be the owner of the said stock and dividend in the aforesaid pending action.

That either the giving of said bond or the payment of said portion of the sum of such judgment will in every way protect the rights of the Silver Bell Copper Company and the said Louis Zeckendorf and his attorneys, and will avoid the cost and expenses of a receiver and therefore the said Steinfeld does apply to this court as aforesaid, that it either discharge the receiver or leave his qualification in abeyance, subject to the further order of this court.

FRANCIS J. HENEY,
EUGENE S. IVES,
Attorneys for Defendants.

STATE OF ARIZONA,
County of Pima, ss:

Albert Setinfeld being duly sworn deposes and says that he is the above named defendant; that he has read the foregoing exceptions and answer to plaintiff's motion for judgment and knows the contents thereof and that the same is true of his own knowledge except as to the matters therein stated to be alleged on information and belief and as to those matters he believes it to be true.

ALBERT STEINFELD.

(Duly verified.)
(Filed March 13, 1913.)

222

(Title of Cause.)

Additional Exceptions.

Now comes Albert Steinfeld, a defendant in the above entitled action, and in addition to the objections and exceptions heretofore made and filed to the motion of Louis Zeckendorf, the plaintiff herein, for a judgment and decree in form and substance as set forth in his motion therefor, does now object and except upon the following grounds, to wit:

1. That there is no finding of fact to the effect that the said Steinfeld made a mistake in voting for the resolution to rescind at the stockholders' meeting held on the 26th day of December, 1903.

2. That there is no finding of fact that Louis Zeckendorf made a mistake in voting for said resolution of rescission.

3. That there is no finding of fact that said Steinfeld intended to vote for a resolution rescinding the contract of May 20, 1903, only in so far as it effected the custody of the money and notes.

4. That there is no finding of fact that said Zeckendorf intended to vote for a resolution rescinding the said contract only in so far as it related to the custody of the money and notes.

FRANCIS J. HENEY,
EUGENE S. IVES,
Attorneys for Defendants.

223 STATE OF ARIZONA,
County of Pima, ss:

Albert Steinfeld being duly sworn, deposes and says that he is the above named defendant; that he has read the foregoing exceptions to plaintiff's motion for judgment, and knows the contents thereof, and that the same is true of his own knowledge except as to the matters therein stated to be alleged on information and belief, and as to those matters he believes it to be true.

ALBERT STEINFELD.

Subscribed and sworn to before me this 13 day of May, 1913.
My commission expires Feb. 29, 1916.

[SEAL.]

J. C. ETHELLS,
Notary Public.

Filed May 13, 1913.

(Title of Cause.)

Judgment and Decree.

The motion of Louis Zeckendorf, plaintiff herein, that this court enter a judgment and decree in this case, in accordance with the mandates of the Supreme Court of the United States, and the Supreme Court of the State of Arizona coming on regularly to be heard, the plaintiff being present and represented by his attorney Honorable Frank H. Hereford, and the defendants being present and represented by their attorneys Honorables Eugene S. Ives and Francis J. Heney, and the matter having been argued and submitted to this court for its decision, and the court being fully advised in the matter, does grant the said motion; and as it appears

224 that this cause came on regularly for trial before the District Court of the First Judicial District, Territory of Arizona, County of Pima, Honorable John H. Campbell, Judge thereof presiding, (a jury having been theretofore regularly waived by all parties), on the 2d day of January, 1908, all parties being present in person and also by their attorneys, evidence oral and documentary having regularly been introduced and offered by the respective parties and received by the court, and the cause having been in regular order and in due course and form argued to the court and submitted to it for its decision, and after due consideration of the pleadings and of all admitted evidence in the case, and after being fully advised in the premises, and under and by virtue of the law and the premises aforesaid, the court having regularly entered its judgment and decree in said case; and as it further appears that appeals by both plaintiff and defendant were taken in due order and time from the said judgment and decree to the Supreme Court of the Territory of Arizona, which in due course and time rendered its judgment and decree affirming the judgment and decree entered by the Lower Court, and that, thereafter in due course and time, appeals were taken by all parties to the Supreme

225 Court of the United States, from the judgment and decree of the Supreme Court of the Territory of Arizona; and as it further appears that thereafter and in due course and time the Supreme Court of the United States approved and affirmed so much of the said judgment rendered by the Lower Court, as related to the second cause of action in plaintiff's complaint set forth, and reversed and remanded for further proceedings not inconsistent with the opinion of the Supreme Court of the United States, so much of said judgment, and all matters connected therewith, as related to the first cause of action, in plaintiff's complaint set forth; and as it further appears from the mandates of the Supreme Court of the United States and the Supreme Court of the State of Arizona, that this court is required to enter such judgment and decree and take such further action as is necessary to effectuate and enforce the mandates of said Supreme Courts of the United States, and of the State of Arizona, and in accordance with the views expressed in the decision rendered by the Supreme Court of the United States in this matter.

Now, therefore, it is ordered, adjudged and decreed:

First. That the appointment of Hiram W. Fenner heretofore made herein as receiver of all the property of every kind and character including money, books and all other assets of or 226 belonging to the defendant, The Silver Bell Copper Company, or to the possession of which, the said company is entitled, is ratified and confirmed, and any person and all persons having any books, money, property or assets belonging to the said Silver Bell Copper Company or other matter or thing, to the possession of which, the said company is entitled are hereby ordered to turn over and deliver the same to the said receiver. That the said receiver hold, retain and keep the same in possession to be distributed, disposed of, paid out or disbursed upon the orders of this court, to be made from time to time in this action; that the said receiver execute the usual oath of office and give and execute a bond in the sum of one hundred thousand (\$100,000) dollars, in the usual form of a receiver's bond, to be approved by the clerk of this court, for the faithful performance by him, of his duties as receiver, and the said Hiram W. Fenner as such receiver, immediately upon the filing of his oath and the approval of his bond as aforesaid, is hereby ordered and directed to take immediate possession of all the said moneys, property, books, papers and other property and assets of the said Silver Bell Copper Company, 227 or to the possession of which it is entitled and to hold, dispose of or disburse the same in accordance with the orders and judgment herein contained and in accordance with the orders to be made by this court from time to time hereafter.

Second. That Albert Steinfeld upon the first cause of action set forth in plaintiff's complaint herein, pay to Hiram W. Fenner as receiver of the Silver Bell Copper Company, for and on behalf of, and as the property of the Silver Bell Copper Company, the sum of One Hundred Twenty-seven Thousand, Six Hundred Twenty-six Dollars and seventy-five cents, (being the amount of

One Hundred Forty-five Thousand Seven Hundred Forty-three Dollars and seventy-five cents, less the sum of Eighteen Thousand One Hundred Seventeen Dollars), together with interest thereon at the rate of six (6) per cent per annum from January 16, 1904, to date, viz: July 1, 1913, said interest amounting to Seventy-two Thousand Four Hundred Twenty-eight Dollars and eighteen cents, making a total at this date, principal and interest of Two Hundred Thousand and Fifty-four Dollars and ninety-three cents; and that the said Silver Bell Copper Company have judgment against the said Albert Steinfeld for the said sum of Two Hundred
228 Thousand and Fifty-four Dollars and ninety-three cents, with interest from date till paid, at six per cent per annum. And that execution issue therefor against the said Albert Steinfeld and his property.

Third. That Albert Steinfeld upon the first cause of action in said complaint set forth, pay to Hiram W. Fenner, the Receiver of the said Silver Bell Copper Company for and on behalf of, and as the property of the said Silver Bell Copper Company, the further sum of One Hundred Thousand Dollars, together with interest thereon at the rate of six (6) per cent per annum from May 20, 1903, to date, viz: July 1, 1913, said interest amounting to Sixty Thousand, Eight Hundred Thirty-three Dollars, and thirty-three cents, making a total amount at this date, principal and interest, of One Hundred and Sixty Thousand Eight Hundred Thirty-three dollars and thirty-three cents; and that the said Silver Bell Copper Company have judgment against the said Albert Steinfeld for the said sum of One Hundred Sixty Thousand, Eight Hundred Thirty-three dollars and thirty-three cents, with interest from date till paid at six per cent per annum, and that execution issue therefor against the said Albert Steinfeld and his property.

229 Fourth. That the said Albert Steinfeld upon the first cause of action in said complaint set forth, pay to the said Hiram W. Fenner, receiver of the said Silver Bell Copper Company as said receiver, for and on behalf of, and as the property of the said Silver Bell Copper Company, the further sum of Twenty-five Thousand, Seven Hundred Fifty Dollars, together with interest thereon from January 16, 1904, to date, viz: July 1, 1913, at six (6) per cent per annum; amounting to the sum of Fourteen Thousand, Six Hundred and Thirteen Dollars and Eleven cents, said principal and interest amounting all told, this 1st day of March, 1913, to Forty Thousand, Three Hundred and Sixty-three Dollars and eleven cents; and that the Silver Bell Copper Company do have judgment against the said Albert Steinfeld for the said sum of Forty Thousand Three Hundred and Sixty-three Dollars and eleven cents, with interest from date till paid, at six (6) per cent per annum, but that execution therefore do not issue till as hereinafter ordered. That the said Albert Steinfeld
230 render an account of all moneys legally and lawfully paid out by him by reason of a garnishment served upon him in the case of S. M. Franklin, plaintiff, vs. Silver Bell Copper Company described and referred to in findings twenty-nine and thirty-five herein; that in such account the said Steinfeld be allowed

interest at the rate of six (6) per cent per annum upon the said sum from January 16, 1904, till the date of judgment or settlement of the said garnishment proceedings; and that he further be allowed interest at the rate of six (6) per cent per annum from the date of the said judgment or settlement of the said garnishment proceedings to the date of the allowance of his said accounting on such sum if any as was paid out by him and allowed by the court by reason of such garnishment proceedings. That execution thereupon issue against the said Albert Steinfeld and his property for such balance if any of said sum of Forty Thousand Three hundred Sixty-three dollars and eleven cents as upon said accounting is found due by said Steinfeld to said Silver Bell Copper Company.

Fifth. That the said Albert Steinfeld, and his bondsmen on appeal, Epes Randolph, Leo Goldschmidt, George Pusch and Fred Fleishman, upon the second cause of action in said complaint set forth, pay to Hiram W. Fenner, the receiver of the Silver Bell Copper Company, for and on behalf of, and as the property of the said Silver Bell Copper Company, and that the said Silver Bell Copper Company do have judgment against the said Albert Steinfeld, Epes Randolph, Leo Goldschmidt, George Pusch and Fred

231 Fleishman, for the further sum of Twenty Thousand, eight Hundred and Fifty dollars, with interest thereon at the rate of six (6) per cent per annum, from the 20th day of January, 1904, to the 30th day of July, 1908, amounting principal and interest on said 30th day of July, 1908, to Twenty-six Thousand, Five Hundred and Fourteen Dollars and twenty-five cents, together with interest on said Twenty-six Thousand Five Hundred and Fourteen dollars and Twenty-five cents, at the rate of six (6) per cent per annum from said July 30, 1908, till paid; and that execution issue therefor against the said Albert Steinfeld, Epes Randolph, Leo Goldschmidt, George Pusch, and Fred Fleishman, and each thereof and their property and the property of each thereof.

Sixth. That the said Albert Steinfeld and Hugo J. Donau and L. Rosenstern, pay to Louis Zeckendorf, plaintiff in the above entitled action, and that the said Louis Zeckendorf do have and recover of and from the said Albert Steinfeld, Hugo J. Donau and L. Rosenstern, plaintiff's costs heretofore taxed and allowed in the said judgment of July 30, 1908, at the sum of Six Hundred Sixty-two dollars and sixty cents, together with interest thereon at the rate of six (6) per cent per annum from the 30th day of July, 1908, till paid, and that plaintiff do have execution therefor in his favor and
232 against said defendant Albert Steinfeld, and the sureties on his said cost bond, viz: Hugo J. Donau and L. Rosenstern, and each thereof and against the property of them and each thereof.

Seventh. That Louis Zeckendorf, plaintiff in the above entitled action, do have and recover of and from Albert Steinfeld and George Pusch and Fred Fleishman, his, plaintiff's costs, on appeal from the Supreme Court of the State of Arizona to the Supreme Court of the United States, amounting to Seventeen Hundred and Two and Sixty-four one hundredths dollars. Together with interest thereon from this date till paid, at the rate of six (6) per cent per annum, and

that plaintiff do have therefor execution in his favor and against the said defendant Albert Steinfeld, and the said George Pusch, and Fred Fleishman, the sureties of the said Steinfeld on appeal as aforesaid, and each thereof, and against the property of them and each thereof.

Eighth. That plaintiff out of said money recovered, and to be recovered by said Silver Bell Copper Company, from said Albert Steinfeld, do have and recover of and from said Silver Bell Copper

Company and the receiver of said company; and the receiver
233 of said company is hereby authorized and directed to pay to said plaintiff, as and for attorneys' fees to Honorables E. A. Meserve and Frank H. Hereford, for the bringing of this action, and the prosecution of the same insofar as relates to said second cause of action, up to and including the entry of the judgment of July 30, 1908, the sum of Two Thousand, Six Hundred Fifty-two Dollars and fifty cents, together with interest thereon from the said 30th day of July, 1908, till paid, at the rate of six (6) per cent per annum.

Ninth. That plaintiff out of the said moneys recovered and to be recovered by Silver Bell Copper Company, from the said Albert Steinfeld, do have and recover of and from the said Silver Bell Copper Company, and the receiver of the said Silver Bell Copper Company is hereby authorized and directed to pay to plaintiff as additional attorney's fees for said Honorables E. A. Meserve and Frank H. Hereford, for bringing this action, and the prosecution of same up to and including the entry of this judgment, the sum of Forty Thousand One Hundred and Twenty-five Dollars and Thirteen cents, with interest thereon from date till paid, at the rate of six (6) per cent per annum.

234 Tenth. That the said Hiram W. Fenner as receiver, and out of the moneys which may be paid by the said Albert Steinfeld, and which shall be recovered from said Steinfeld or his bondsmen in this action, shall pay to Louis Zeekendorf, plaintiff herein, in addition to the attorney's fees and court costs hereinbefore ordered to be paid, all costs, expenses and obligations incurred by the said plaintiff in this litigation, and not herein otherwise allowed; after an account of same has been presented, audited and approved by this court.

Eleventh. That the said Hiram W. Fenner as said receiver out of the moneys which may be paid to him by the said Albert Steinfeld, and which shall be recovered from said Steinfeld in this action, shall pay to said Albert Steinfeld all sums of money heretofore necessarily paid by the said Steinfeld for and on account of the said Silver Bell Copper Company, after an account of the same has been presented, audited and approved by this court.

Twelfth. That upon the final termination of this action, the said Silver Bell Copper Company shall be dissolved, and that thereupon
235 all its debts and liabilities remaining unpaid, shall then, under the direction of this court, be paid and discharged, and all of its property, money and assets then remaining, shall, under the direction of this court, be distributed amongst its stockholders, in the proportion of their several ownerships of stock; that

said dissolution payment, disbursements and distributions, are to be made, done and accomplished by orders of this court, for that purpose, in this action made, and to be made.

Dated July 1st, 1913.

FRED SUTTER, *Judge.*

(Filed July 1st, 1913.)

236

(Title of Court and Cause.)

Motion to Set Aside Judgment.

Now come the defendants and move the court to set aside its judgment on the first cause of action heretofore rendered on June 16, 1913, and place such cause upon the trial docket in said court, and present the following grounds:

1. The court erred in construing the mandate of the Supreme Court of the State of Arizona and the mandate of the Supreme Court of the United States to require or direct that a judgment be entered against the defendant Steinfeld on the first cause of action.

2. The court erred in refusing to exercise a judicial discretion in the determination of the motion for judgment on the first cause of action and in holding that under the mandates of the Supreme Court of the United States and the Supreme Court of the State of Arizona, or either or both of them, the court was required or directed to enter judgment against Steinfeld on the first cause of action.

3. The court erred in holding that it had no power to grant a new trial of the first cause of action.

237 4. The court erred in holding that judgment against the defendant Steinfeld on the first cause of action is supported by the findings of fact of the trial court on the second trial or the statement of facts of the territorial Supreme Court on the second appeal, or either or both of them, or by the pleadings.

5. The court erred in holding that the question of intent of defendant Steinfeld and the other stockholders at the stockholder's meeting of December 26, 1903, at which said agreement of May 20, 1903, was rescinded in terms and in voting for such rescission, is a question of law and not one of fact.

6. The court erred in holding that because the question of such intent is one of law to be deduced from facts found, a new trial cannot be had for the reason that it appears that at the second trial the said question of intent was not an issue of fact or law in the case by reason of the decision of the Supreme Court of the Territory of Arizona on the first appeal; and for the further reason that neither the trial court on the second trial nor the territorial Supreme Court on the second appeal found facts from which it was intended that there should be deduced as a conclusion of law that defendant Steinfeld and the other stockholders in voting for such rescinding resolution intended

238 to rescind the said agreement in part only, nor is there any finding of fact by either of said courts to that effect, but on the contrary there is no finding of fact that Steinfeld or the other stock-

holders had any such intent, nor are there found any facts from which such intent may be deduced as a conclusion of law, because the said courts took the view that such intent was not an issue in the case, either of law or fact; and for the further reason that by reason of the view the said courts took of the question of intent, the defendant Steinfeld at the second trial did not have an opportunity to present his evidence on that question and had he presented it, such evidence would have been objectionable as immaterial.

7. The judgment of this court heretofore made and entered on the second trial of the first cause of action has not been reversed or modified by the Supreme Court of the territory or state of Arizona.

8. The judgment entered on the first cause of action on July 30, 1908, was affirmed by the Supreme Court of the Territory of Arizona, and has not been reversed or modified by that court or the Supreme Court of the state.

239 9. The Court erred in not proceeding in compliance with the mandate of the Supreme Court of the United States wherein it is directed that "such further proceedings be had in said cause in conformity with the opinion and judgment of the court as according to right and justice and the laws of the United States ought to be had," and in failing to exercise a judicial discretion in the determination of what further proceedings ought to be had with respect to the first cause of action and in holding that the said mandate required a judgment against the defendant Steinfeld.

10. The Court erred in not proceeding in compliance with the mandate of Supreme Court of Arizona that "such action be had in said cause as by the mandate of the said Supreme Court may be proper" for the reason that the said mandate of the Supreme Court of the United States commanded that a judicial discretion be exercised in determining what further proceedings were necessary, and under the mandate of the Supreme Court of Arizona no other action except the exercise of a judicial discretion would be proper, which discretion the court failed to exercise, but on the contrary held that it was bound by the said mandates to enter a judgment against the defendant.

240 11. The court erred in not exercising any judicial discretion and ordering a new trial for the reason that the defendant Steinfeld has never had an opportunity to be heard on the issue of intent, and the judgment of the court is a decision against said defendant on that question without giving him an opportunity to be heard.

12. The court erred in holding that the findings of fact made by the trial court on the second trial or the statement of facts made by the territorial supreme court on the second appeal, or both of them, or the pleadings are sufficient to support a judgment against the defendant Steinfeld for the reason that it is not alleged in the third amended complaint, upon which the case was tried, nor found as a fact that Zeckendorf or Steinfeld or the stockholders intended the resolution passed at the stockholders' meeting of December 26, 1903, to have any other or different effect than an entire rescission of the agreement of May 20, 1903, nor are any facts found as to such intent

or from which such intent may be deduced, nor is there alleged or found any fact or facts stating, showing or tending to show, or from which might be deduced as a conclusion of law, misrepresentation, concealment or other fraudulent practice on the part of the defendant Steinfeld or any one in his behalf; or any facts stating, showing, or tending to show, or from which might be deduced as a conclusion of law that any mistake of any material fact was made by or on the part of the plaintiff or any other stockholders in voting in favor of said resolution rescinding the said contract of May 20, 1903.

13. The court erred in allowing interest on the moneys adjudged to be due to the company on the first cause of action for the reason that under Chapter 84, Laws of 1909, interest is not allowable on this character of obligation, and for the further reason that interest is not properly allowable by way of damages in such a case as this; and for the further reason that there are no allegations in the complaint alleging damages for wilful detention, or facts found that will justify such damages.

14. The court erred in allowing attorneys' fees in the sum of 10 per cent. or in any other sum, on the first cause of action.

15. The court erred in allowing a percentage on the entire amount found to be due on the first cause of action, or on any greater amount than that to which the plaintiff Zeckendorf is entitled as stockholder in the said corporation.

16. The court erred in allowing attorneys' fees without hearing proof as to the value of the services of the attorneys.

17. The court erred in not providing in its judgment that an account be struck between the company and Steinfeld in so far as the first cause of action is concerned, and judgment be entered against Steinfeld in such sum upon said accounting as it is determined is due and owing from him to the company, less that portion to which he is entitled as stockholder.

18. The court erred in allowing ten per cent as attorneys' fees on the entire amount recovered, for the reason that the same is greatly in excess of the value of the services of such attorneys.

19. The court erred in not construing the mandates of the Supreme Court of the United States and the Supreme Court of the State of Arizona to require a new trial of the first cause of action.

Attorneys for Defendant.

(Filed June 25, 1913.)

243

(Title of Court and Cause.)

Motion for New Trial.

Now come the defendants and move for a new trial of the first cause of action and to rehear the motion for judgment on the following grounds:

1. The court erred in construing the mandate of the Supreme Court of the State of Arizona and the mandate of the Supreme Court of the United States to require or direct that a judgment be entered against the defendant Steinfeld on the first cause of action.

2. The court erred in refusing to exercise a judicial discretion in the determination of the motion for judgment on the first cause of action and in holding that under the mandates of the Supreme Court of the United States and the Supreme Court of the State of Arizona, or either or both of them, the court was required or directed to enter judgment against Steinfeld on the first cause of action.

3. The court erred in holding that it had no power to grant a new trial of the first cause of action.

4. The court erred in holding that judgment against the
244 defendant Steinfeld on the first cause of action is supported by the findings of fact of the trial court on the second trial or the statement of fact of the territorial supreme court on the second appeal, or either or both of them, or by the pleadings.

5. The court erred in holding that the question of intent of defendant Steinfeld and the other stockholders at the stockholders' meeting of December 26, 1903, at which said agreement of May 20, 1903, was rescinded in terms, and in voting for such rescission, is a question of law and not one of fact.

6. The court erred in holding that because the question of such intent is one of law to be deduced from facts found, a new trial cannot be had for the reason that it appears that at the second trial the said question of intent was not an issue of fact or law in the case by reason of the decision of the Supreme Court of the Territory of Arizona on the first appeal; and for the further reason that neither the trial court on the second trial nor the territorial supreme court on the second appeal found facts from which it was intended that

there should be deduced as a conclusion of law that defendant
245 Steinfeld and the other stockholders in voting for such rescinding resolution intended to rescind the said agreement in part only, nor is there any finding of fact by either of said courts to that effect, but on the contrary there is no finding of fact that Steinfeld or the other stockholders had any such intent, nor are there found any facts from which such intent may be deduced as a conclusion of law, because the said courts took the view that such intent was not an issue in the case, either of law or fact; and for the further reason that by reason of the view the said courts took of the question of intent, the defendant Steinfeld at the second trial did not have an opportunity to present his evidence on that question, and had he presented it such evidence would have been objectionable as immaterial.

7. The judgment of this court heretofore made and entered on the second trial of the first cause of action has not been reversed or modified by the Supreme Court of the territory or state of Arizona.

8. The judgment entered on the first cause of action on July 30, 1908, was affirmed by the supreme court of the territory of
246 Arizona, and has not been reversed or modified by that court or the supreme court of the state.

9. The court erred in not proceeding in compliance with the mandate of the Supreme Court of the United States wherein it is directed that "such further proceedings be had in said cause in conformity with the opinion and judgment of the court as according to right and justice and the laws of the United States ought to be had," and in failing to exercise a judicial discretion in the determination of what further proceedings ought to be had with respect to the first cause of action and in holding that the said mandate required a judgment against the defendant Steinfeld.

10. The court erred in not proceeding in compliance with the mandate of the Supreme Court of Arizona that "such action be had in said cause as by the mandate of the said supreme court may be proper" for the reason that the said mandate of the Supreme Court of the United States commanded that a judicial discretion be exercised in determining what further proceedings were necessary, and under the mandate of the Supreme Court of Arizona no other action except the exercise of a judicial discretion would be proper, 247 which discretion the court failed to exercise, but on the contrary held that it was bound by the said mandates to enter a judgment against the defendant.

11. The court erred in not exercising *in* judicial discretion and ordering a new trial for the reason that the defendant Steinfeld has never had an opportunity to be heard on the issue of intent, and the judgment of the court is a decision against said defendant on that question without giving him an opportunity to be heard.

12. The court erred in holding that the findings of fact made by the trial court on the second trial or the statement of facts made by the territorial supreme court on the second appeal, or both of them, or the pleadings are sufficient to support a judgment against the defendant Steinfeld for the reason that it is not alleged in the third amended complaint, upon which the case was tried, nor found as a fact that Zeckendorf or Steinfeld or the stockholders intended the resolution passed at the stockholders' meeting of December 26, 1903, to have any other or different effect than an entire rescission 248 of the agreement of May 20, 1903, nor are any facts found as to such intent or from which such intent may be deduced; nor is there alleged or found any fact or facts stating, showing or tending to show, or from which might be deduced as a conclusion of law, misrepresentation, concealment or other fraudulent practice on the part of the defendant Steinfeld or any one in his behalf; or any facts stating, showing, or tending to show, or from which might be deduced as a conclusion of law that any mistake of any material fact was made by or on the part of the plaintiff or any other stockholders in voting in favor of said resolution rescinding the said contract of May 20, 1903.

13. The court erred in allowing interest on the moneys adjudged to be due to the company on the first cause of action for the reason that under Chapter 84, laws of 1909, interest is not allowable on this character of obligation, and for the further reason that interest is not properly allowable by way of damages in such a case as this; and for the further reason that there are no allegations in the complaint

alleging damages for wilful detention, or facts found that will justify such damages.

249 14. The court erred in allowing attorney's fee, in the sum of 10 per cent, or in any other sum, on the first cause of action.

20. The court erred in allowing a percentage on the entire amount found to be due on the first cause of action, or on any greater amount than that to which the plaintiff Zeckendorf is entitled as stockholder in said corporation.

16. The court erred in allowing attorneys' fees without hearing proof as to the value of the services of the attorneys.

17. The court erred in not providing in its judgment that an account be struck between the Company and Steinfeld in so far as the first cause of action is concerned, and that judgment be entered against Steinfeld in the sum as upon said accounting it may be determined is due and owing from him to the company, less that portion to which he is entitled as stockholder.

18. The court erred in allowing ten per cent as attorneys' fees on the entire amount recovered for the reason that the same is greatly in excess of the value of the services of such attorneys.

250 19. The court erred in not construing the mandates of the Supreme Court of the United States and the Supreme Court of the State of Arizona to require a new trial of the first cause of action.

FRANCIS J. HENEY,
EUGENE S. IVES,
Attorneys for Defendant.

(Filed June 25, 1912.)

(Title of Cause.)

Motion to Modify Judgment.

Now come the defendants and move the court to modify its judgment entered on the 16th of June, 1913, in the following particulars:

1. By eliminating all interest from the amounts found to be due on the first cause of action.

2. By providing that the defendant Steinfeld shall render an account to the receiver or to an auditor or officer of the court for all moneys found to be due on the first cause of action, and providing that there be deducted from such amount that portion of the same that Steinfeld shall be found to be entitled to as a stockholder.

251 of the said company less his proportion of the fees for the attorneys, receiver and lawful charges and fees; and further providing for an entry against Steinfeld for such amount found to be due after making such deduction and that interest and attorneys' fees be based on such amount only.

3. By eliminating attorneys' fees from the first cause of action.

4. By providing that testimony be heard on the value of the services of the attorneys except that the amount provided for as attorneys' fees in the judgment of July 30, 1908, be undisturbed.

5. By allowing no fees to attorneys for Zeckendorf on the first cause of action except on that portion recovered which belongs or will be distributed to Zeckendorf as stockholder of said corporation; such amount so allowed as attorneys' fees to be borne by all the stockholders in proportion to their stockholdings or as otherwise ordered.

6. By deducting from the amount found to be due from Steinfeld to the company on the first cause of action the sum of \$14,700, being the amount Steinfeld paid on the Francis-Volkert contract for and on behalf of said corporation.

252 7. By eliminating all reference to the second cause of
action as to the amount due thereon, the judgment of July
30, 1908, having been affirmed, and the same having become final.

FRANCIS J. HENEY,
EUGENE S. IVES,

Attorneys for Defendant.

(Filed June 25, 1913.)

(Title of Cause.)

Motion to Modify Judgment and Discharge Receiver.

Come now the defendants, and as a part of and amendment to and supplementary to the motion filed in the above entitled cause on the 25th day of June, 1913, to modify the judgment in the above entitled cause, rendered on the 16th day of June, 1913.

Move the court to modify said judgment and all that part thereof relating to the appointment and qualification and duties of a receiver in the above entitled cause, and to discharge said receiver, for the following reasons, to wit:

1. For the reason that it appears from the affidavits hereto attached and the records of this cause, that the said Silver Bell Copper Company, a corporation has no debts; that it appears
253 that the sole and only stockholders in said corporation are
Albert Steinfeld and Louis Zeckendorf, parties to this action;

2. For the reason that it appears that the said corporation is not a going concern and owns no property of any kind except whatever moneys may be found to be due it by reason of this action;

3. For the reason that it appears that full and complete justice may be done the plaintiff in this action by directing the defendant, Albert Steinfeld, to pay directly to the said plaintiff, Louis Zeckendorf, the amount of money that this court may decree unto him.

That this motion is based upon the affidavits hereto attached and the records in this cause.

FRANCIS J. HENEY,
EUGENE S. IVES,

Attorneys for Defendant.

Gerald Jones being first duly sworn, deposes and says: that he is employed as an attorney at law by Eugene S. Ives, an attorney at law; that the said Eugene S. Ives, is the attorney for the defendants

in the above entitled action; that by reason of said employment
affiant is familiar with said action; that it appears in the
254 record of said action that the shares of stock of the Silver Bell
Copper Company, and being thirty (30) in number, stand-
ing in the name of William Zeckendorf, were sold, transferred and
assigned to Albert Steinfeld, and that said assignment was at least
more than one year prior to this date.

GERALD JONES.

(Duly verified June 28, 1913.)

R. K. Shelton being first duly sworn, deposes and says: That he
is one of the defendants in the above entitled action; that for a
long time prior to November 8th, 1912, he was the owner of certi-
ficate No. 5, being a certificate of stock for one (1) share in the above
named defendant Silver Bell Copper Company, a corporation; that
on said 8th day of November, 1912, for a valuable consideration he
sold, transferred and assigned to Albert Steinfeld, one of the above
named defendants, all his right, title and interest in and to the said
one (1) share of stock represented by said certificate, and that he
has no further interest in said corporation.

R. K. SHELTON.

(Duly verified June 28, 1913.)

J. N. Curtis being first duly sworn, deposes and says: That he is
one of the defendants in the above entitled action; that he is now,
and for a long time has been the President of the Silver
255 Bell Copper Company, a corporation, one of the above named
defendants, and is and has been during all of such time
familiar with the business, affairs and books of the said Company,
and that said corporation is not indebted to anyone whatsoever ex-
cept Albert Steinfeld, one of the above named defendants.

J. N. CURTIS.

(Duly verified June 28, 1913.)

Gerald Jones being first duly sworn, deposes and says: That he
is employed as an attorney at law by Eugene S. Ives, an attorney at
law; that the said Eugene S. Ives is the attorney for Albert Stein-
feld in an action brought against the said Steinfeld and others in
the District Court of the First Judicial District of the Territory of
Arizona in and for the County of Pima, (now the Superior Court
of said county) entitled Mary Nielsen administratrix of the estate
of Carl S. Nielsen, deceased, and said Mary Nielsen in her own
personal right, plaintiffs, against Albert Steinfeld and the Nielsen
Mining and Smelting Company, a corporation, now known as and
called the Silver Bell Copper Company, a corporation, defendants;
that by reason of said employment, affiant is conversant with and
knows the status of said action; that a true copy of the complaint,
256 answer, replication, findings of fact and judgment in said
cause are attached hereto and by reference made a part
hereof; that in the said District Court, as appears by the
papers above referred to, judgment was rendered against said Albert

Steinfeld in the amount therein named, the same representing the dividends due on 300 shares of stock in the said Silver Bell Copper Company claimed by the plaintiffs to be their property, and the said 300 shares of stock being the identical 300 shares of stock of said Silver Bell Copper Company involved in the above entitled action; that thereafter such proceedings were had in said action that the defendants appealed to the Supreme Court of the Territory of Arizona (now Supreme Court of the State of Arizona) wherein the judgment of the said District Court was reversed and judgment ordered for the defendants upon the findings of fact; that thereafter the plaintiffs did appeal from the judgment of the Supreme Court of the Territory of Arizona, to the Supreme Court of the United States, and such proceedings were there had that the judgment of the Supreme Court of the Territory of Arizona was reversed, and the case sent back to the Supreme Court of the State of Arizona, there to stand as though upon appeal from the trial court, and that said case was thereafter submitted to the Supreme Court of the State of Arizona, and a statement of facts made in accordance with the decision of the Supreme Court of the United States, and that said cause is now pending on motion for rehearing in the said Supreme Court of the State of Arizona.

GERALD JONES.

(Duly verified June 28, 1913.)

J. N. Curtis being first duly sworn, deposes and says: That he is one of the defendants in the above entitled action; that for a long time prior to November 7th, 1912, he was the owner of certificate No. 4, being a certificate of stock for one hundred and seventy (170) shares in the above named defendant Silver Bell Copper Company, a corporation; that on said 7th day of November, 1912, for a valuable consideration he sold, transferred and assigned to Albert Steinfeld, one of the above named defendants, all of his right, title and interest in and to the said one hundred and seventy (170) shares of stock represented by said certificate, and that he has no further interest in said corporation.

J. N. CURTIS.

(Duly verified June 28, 1913.)

(Filed June 28, 1913.)

258 (Title of Court and Cause.)

Additional Exceptions and Objections to Judgment.

Now comes Albert Steinfeld, a defendant in the above entitled action, and opposes the motion of Louis Zeckendorf, the plaintiff herein, for a judgment and decree, in form and substance as set forth in his aforesaid motion, and in his proposed form of judgment heretofore submitted to this court and further objects and further takes exceptions to so much thereof as relates to the first cause of action set forth in plaintiff's third amended

259 complant herein, upon the following grounds, to wit:

That upon the first trial of this case the District Court of the Territory of Arizona, in and for the County of Pima, made the following findings of fact, to wit:

VIII.

The Court does not find on the issues raised by the pleadings as to the ownership, legal or equitable, prior to said sale thereof, of the several properties, described and listed in said schedule and amended complaint on file herein, for the reason that the aforesaid agreement, dated May 20, 1903, in finding VII set out, established the ownership of the entire purchase price of the said property in cash and notes, to be in the said Silver Bell Copper Company. From and after the 20th day of May, 1903, the said Silver Bell Copper Company continued to be the owner of the whole of said purchase price, viz: Said sum of \$115,000.00 paid in cash by said Imperial Copper Company, and said four promissory notes for \$100,000.00 each, except as the same was thereafter legally disbursed and paid out as hereinafter found.

260 And that said court upon said trial, also made the following finding of fact, to wit:

X.

That on the 26th day of December, 1903, a meeting of the stockholders of the defendant corporation was duly had; all of the stock of the defendant corporation was represented at such meeting, the said Zeckendorf being present in person and being furthermore represented by his attorney, also there in person.

At said meeting a resolution was offered as follows:

(Resolved, That the agreement executed on May 20th, by the President and Secretary of the corporation with the Mammoth Copper Company, and Albert Steinfeld, a copy of which is hereto annexed, be and the same hereby is, rescinded, and that the said agreement and the resolution of the directors passed on said day be declared null and void.)

(Copy of said agreement of May 20, 1903, above set out was attached to said resolution.)

That said resolution was unanimously passed, all of the stock of said corporation voting in favor thereof, the said Zeckendorf in person voting 250 shares of the stock of the said corporation in favor of the said resolution.

Said resolution so passed at said stockholders' meeting was not procured by false representation, misconduct or fraudulent practices, but it was manifest to the directors of said corporation and it is a fact that neither the said Zeckendorf nor any other stockholder present in voting for said resolution intended to advise, direct, consent or assent to a rescission of any part of the said agreement of date May 20, 1903, or of any other agreement or resolution, whereby the said Silver Bell Copper Company became, or might have become, the owner of the entire purchase price of

said properties conveyed to the Imperial Copper Company. All of said stockholders of said company understood that the entire controversy, then existing, was with respect alone to the right to the custody of the said purchase price (cash and notes) and that no question of ownership therein or thereof was involved or being raised."

That said defendant Albert Steinfeld filed a motion for a new trial in said case, upon the ground, among others, first, that the evidence does not sustain the judgment, and second, that the judgment is contrary to law, and third, that the court failed to find upon certain material issues raised by the pleadings, and failed to find certain material facts.

That said District Court denied the motion of Steinfeld for a new trial upon each of said grounds.

262 That an appeal was taken by said Steinfeld from said judgment of said District Court, and from its order denying his motion for a new trial in said action, to the Supreme Court of the Territory, and that on said appeal said Steinfeld assigned as error, his contention that the evidence was insufficient to support the aforesaid finding of the trial court No. "X," insofar as it related to the intent and understanding of the stockholders and each of them in voting for the rescission of said contract of May 20, 1903, to wit, to that part of said finding and the whole thereof, which reads as follows, to wit:

"* * * but it was manifest to the directors of said corporation and it is a fact that neither the said Zeckendorf nor any other stockholder present in voting for said resolution intended to advise, direct, consent or assent, to a rescission of any part of the said agreement of date May 20, 1903, or of any other agreement or resolution, whereby the said Silver Bell Copper Company became, or might have become, the owner of the entire purchase price of the said properties conveyed to the Imperial Copper Company. All of said stockholders of said company understood that the entire controversy, then existing
263 was with respect alone to the right to the custody of the said purchase price (cash and notes) and that no question of ownership therein or thereof was involved or being raised."

That upon said appeal the Supreme Court of the Territory did not pass upon said assignment of error or any of said assignments of error relating to said question, for the reason that said court was of the opinion that the intent of the stockholders in voting to rescind the contract of May 20, 1903, at said meeting on December 26, 1903, was not a material fact or a material issue in this action, for the reason, as stated by said Supreme Court of the Territory in its said decision, that "Assuming the fact to be sustained by the evidence that the parties to the agreement of May 20, 1903, in rescinding it did not intend thereby to affect all the provisions thereof, but only a part thereof, a question of law is thus presented."

The Supreme Court of the Territory then proceeds to discuss, and to lay down its opinion upon this question of law, and then says:

It seems clear from the findings of the court that the misapprehension of the parties as to the effect of the rescission of the agree-

ment of May 20, 1903, was as to the legal effect of the language used in the agreement, and did not arise from any misapprehension of fact. There is no room for doubt as to the meaning of the resolution of the stockholders or of the resolution of the board of directors of the Silver Bell Copper Company or of the agreement of rescission, as these were expressed. The former unequivocally refers to the agreement as an entirety, and the latter sets it forth in full, and specifically provides that it shall be rescinded, annulled, and held of no effect. It seems clear, therefore, under the well established rule above stated that mistakes of law, unconnected with mistakes of fact, cannot be corrected by a court of equity, unless there be some fraud which in itself will afford ground for equitable relief, the agreement of May 20, 1903, without reference to the intent of the parties being otherwise than as expressed, must be regarded as rescinded as a whole. The court specifically found that there was no fraud in the transaction. That the rescission cannot be construed otherwise than as an entirety is apparent from the nature of the agreement and the rights of the parties which were established therein. The agreement after reciting that it was the desire of the parties to settle the question of the disposition of the proceeds of the sale, and after reciting that Steinfeld has assumed certain obligations as a guarantor of the titles of the properties, contained three provisions; 1. That said proceeds should be the property of the Silver Bell Copper Company; 2. That Steinfeld should hold the same as security against loss arising from said guaranty; and 3. That no dividend should be declared by the company until Steinfeld should be indemnified from any such loss. It is impossible to read into this agreement any provision which established title to any of the properties sold, either in Steinfeld or in the company. It relates wholly and entirely to the proceeds of the sale, and only establishes the disposition to be made of these proceeds. Again, the agreement, relating as we have seen, to the distribution of the proceeds which had not at the time of its execution been made, was executory in its nature and remained such when this suit was brought. It therefore was as to all of its provisions the subject of rescission. Furthermore, its various provisions relating to but one thing—namely, the disposition of the proceeds of the sale—none of these can be severed from the whole without affecting the others. The findings of the court, that the agreement was rescinded, must be taken, therefore, notwithstanding the finding of the court that the parties did not so construe the effect of their rescission, as an adjudication that all rights created by the agreement were abrogated by the parties.

10 Arizona, pages 231-232.

266 The Supreme Court of the Territory reversed the judgment of the trial court in favor of Zeckendorf, upon said first cause of action, and sent the case back for a new trial.

That upon the second trial of this action the case was submitted to the court by stipulation of the parties, upon all of the same evidence and of the same evidence only, which was produced upon the final trial. That upon this second trial of this action, the trial court and both sides necessarily proceeded upon the theory that the afore-

said opinion by the Supreme Court of the Territory, insofar as it relates to the intent of the parties at the stockholders' meeting of December 26, 1903, in voting to rescind the contract of May 20, 1903, was the law of the case and was absolutely binding upon the trial court and upon the parties to this action during all further proceedings in the case, unless it should thereafter be reversed or overruled by the Supreme Court of the United States, and that consequently upon the Second trial of this action the District Court of the Territory was compelled under the law of the case to refrain from making any finding of fact upon the question of the intent of the parties in voting to rescind the said contract of May 20, 1903, at said stockholders' meeting of December 26, 1903, and that
 267 said trial court did refrain from making any finding of fact upon said issue at said second trial, and that this defendant, Albert Steinfeld, was thereby precluded from having his rights adjudicated upon said question by having any court pass upon the effect of the evidence produced upon that question at said second trial, to sustain a finding of fact to the effect that the parties did not intend to rescind said contract of May 20, 1903, except insofar as it related to the custody of the money or notes by said defendant Steinfeld, or to have the question passed upon by an appellate court as to the sufficiency of the evidence which was produced at said first trial, and likewise at said second trial, upon this question, to sustain such a finding of fact.

That under the issues in this case this question of intent is the controlling and paramount issue upon which this case must be decided, and that through no fault of his own or his attorneys in this case, the said defendant Albert Steinfeld will have been deprived of his legal, equitable and moral right to have this issue decided in accordance with law if this court now proceeds to enter judgment in favor of Zeckendorf, without a new trial of this issue, or without exercising its discretion to review the evidence upon this issue
 268 and all thereof, which was produced at the first trial of this case, and likewise introduced by stipulation at the second trial of this case.

EUGENE S. IVES,
 FRANCIS J. HENEY,
 S. L. KINGAN,
Attorneys for Defendants.

STATE OF ARIZONA,
County of Pima, ss:

Albert Steinfeld being first duly sworn, deposes and says: That he is the above named defendant; that he has read the foregoing exceptions and objections to the plaintiff's motion for judgment, and knows the contents thereof, and that the same is true of his own knowledge, except as to matters therein stated to be alleged on information and belief, and as to these matters that he believes it to be true.

ALBERT STEINFELD.

Subscribed and sworn to before me this 1st day of July, A. D., 1913.

My commission expires March 4, 1915.

[SEAL.]

BEPPIE LESLIE,
Notary Public.

(Filed July 1, 1913.)

268½

First Session.

(Monday, June 15th, 1913.)

Appearances:

For the Plaintiff: F. E. Curley, Esq.

For the Defendants: S. L. Pattee, Esq.; Gerald Jones, Esq.

For the Receiver: S. M. Franklin, Esq.

269 In the Superior Court of the State of Arizona in and for the
County of Pima.

No. 3496.

LOUIS ZECKENDORF, Plaintiff,

vs.

ALBERT STEINFELD et al., Defendants.

Decision of the Court.

(Judge Sutter Presiding.)

The COURT: Case No. 3496, Zeckendorf against Steinfeld, et al., this is the date set by the court for the rendition of judgment in that case. Are the parties ready?

Mr. PATTEE: Yes, your Honor.

Mr. CURLEY: Ready, your Honor.

The COURT: The time the case was orally argued to the court, the court at that time indicated practically the feeling of the court on the proposition, which was to the effect that the court was of the opinion that no new trial should be granted. Counsel for the defendants requested that they be given the opportunity to file briefs. The court permitted them to do so, and after carefully reading and considering those briefs the court has not changed its mind on the proposition, and it is still of the opinion that no new trial should be granted; that the judgment should be rendered as indicated

270 by the decision of the Supreme Court of the United States.

The motion for judgment will therefore be granted.

There was a supplemental objection filed by the defendants to rendering judgment, I think. I haven't those papers before me. I came away and forgot them. But one of the grounds for objecting to judgment set up in the supplemental objections was that the trial court made no finding that the stockholders intended to re-

scind the contract. The court cannot consider that objection for the reason that that would not be a finding. It would be a conclusion of law based on a finding. The court would have to first find certain facts and then conclude from those facts that they did not intend. That would be a legal conclusion. Another objection was that the court did not make findings to the effect that there was a mistake made in the rescission, a mistake of law. That would not be a finding; it would necessarily be a conclusion based on a finding. And taking all of the objections all the way through that were submitted in the supplemental objections filed by the defendants, they were the same thing; they were nothing but conclusions of law which would necessarily have to be based on findings of fact; by reading the decision of the Supreme Court of the United States, you will find that they discuss the same proposition. Counsel for defendants there argued that a finding made by the Supreme
271 Court of the Territory and the trial court was not a finding but was a conclusion of law, and that finding was to the effect that it was not intended to rescind the contract. The Supreme Court of the United States say there that that was not a finding, possibly, but it was probably a conclusion of law, and if so was the proper conclusion based upon facts, which is a parallel case to the one submitted by counsel for the defendants; and as I said before the motion for judgment will be granted.

That leads up then to the further proposition of the receiver. I believe the record shows that the receiver has already been appointed.

Mr. CURLEY: Yes, I think that is the case. You represent the receiver, Mr. Franklin.

The COURT: And has that receiver qualified?

Mr. FRANKLIN: No, your Honor, the amount of the receiver's bond was never fixed. He was appointed and the amount was left blank until the question of the amount of property that he would be responsible for should have been ascertained.

The COURT: What do the statutes say on that proposition? I think that was left in the discretion of the court.

Mr. PATTEE: May it please the court, I would suggest here that while your Honor has granted the motion for judgment—I
272 appear for Mr. Steinfeld and for Mr. Ives at the request of Mr. Steinfeld—that the form of the judgment and some of the details of the judgment must of necessity be left open. As I understand it, they were not discussed by counsel because they were left to the settlement of the main question which your Honor has now decided.

The COURT: There was a form of judgment submitted.

Mr. PATTEE: A form of judgment to which there were some objections.

The COURT: It is evidently on my desk at home. I had forgotten to bring it with me.

Mr. PATTEE: As I understand, counsel did not think it necessary to discuss the details of that judgment until it could be determined that there would be a judgment.

As to the receivership, it is true that there has been a receiver. The judgment of this court originally appointed a receiver and that judgment has been affirmed all the way down the line. So far as the propriety of the appointment of the receiver or the right of the court to appoint a receiver, that might be regarded as settled. But the necessity of a receiver is a question that we desire to be kept open. A receiver merely to receive money from one party and hand it over to another seems useless. The court had power
 273 to appoint a receiver, as it did appoint it. It did not abuse its discretionary powers in that respect. Several of the appellate courts have so held. But the power to dispense with the receiver still exists notwithstanding those several affirmances, and if there is no use for a receiver, if the receiver is nothing but a creator of useless expense, of useless trouble and delay, there ought to be no receiver. A receiver merely to receive a fund and disburse it would be proper only under exceptional circumstances.

The COURT: Let me ask you, Mr. Pattee: of course the court has not read all the proceedings of the trial court. I have simply gone into the judgment of the Supreme Court of the United States and these briefs and objections, but I take it from the decision of the Supreme Court of the United States and that of the Supreme Court of the Territory of Arizona in this case that the receiver was appointed not only to disburse this money but to wind up the affairs of the corporation.

Mr. PATTEE: Yes, but it is perfectly clear from reading the decision of the Supreme Court that the winding up consists merely in receiving and disbursing money. There is nothing else for the receiver to do. My knowledge of this record is complete within the last year or two—up to the submission of the case to the
 274 United States Supreme Court—it is not so complete since then. But that knowledge enables me to state with a good deal of confidence that there is nothing else for the receiver to do, except to receive something like \$200,000 and pay it out. Now that is all there is to it. There is no reason why the Clerk of the court or the Sheriff, or some other officer duly appointed by the court could not do it in his official capacity, and do it just as well.

The COURT: That may be true, but the Supreme Court of the Territory of Arizona affirmed the decision of the lower court appointing the receiver, and the Supreme Court of the United States has affirmed that decision.

Mr. PATTEE: Very well, but those two decisions determining that there was a non-abuse of discretion on the part of the trial court do not preclude the trial court from still further exercising its discretion, if it in the light of the existing situation sees that there is no necessity or use for a receiver; that the expense of a receiver and the expense of a receiver's counsel for advising him to deposit the money in the bank or something like that is wholly unnecessary and should not be visited upon the parties. For that reason we would like to have that question left open with the form of the judgment, and the form of judgment must of necessity be
 275 left open until counsel who are not present can be heard on it.

Now the subject of interest I believe also was a matter that was not discussed. The question of attorneys' fees, which as we conceive it will require proof, has not been considered. There are things about the judgment which must of necessity be left open.

The COURT: They will not be left open. This court is rendering judgment and the judgment will be completely rendered at this time.

Mr. PATTEE: As we conceive it, the judgment must be in its nature interlocutory.

The COURT: The only question that will be left open will be the submission of the form of judgment. The judgment will be rendered now of the entire case, and then there will be left simply the submission by counsel of the form of judgment.

Mr. PATTEE: As I understand it, certain questions relating to that judgment were to be left open for further discussion.

The COURT: No, there was no understanding to that effect. There was a request to that effect which request was never granted.

Mr. PATTEE: Take the question of attorneys' fees; as we conceive it that will take proof. Of necessity there can be nothing more than
276 reasonable attorneys' fees, and what those reasonable attorneys' fees are is hardly within the judicial notice of the court. Now 10% might be proper in one case, too much in another and too little in another. There is nothing sacred about any percentage of recovery.

The COURT: The court will state this: unless you want to argue that, unless you want to argue that the attorneys' fees should be raised from 10%, the court will not listen to any argument.

Mr. PATTEE: If 10% were going to be a minimum established as a precedent for other cases, I would be very glad to have that established, but I don't think it is established without proof that 10% is a legal minimum which could be applied to all cases under all circumstances, and if not, it is open to discussion and open to proof. Unless the court can say as a matter of law, general, universal law that 10% of the recovery is the minimum fee that can ever be allowed, then the subject is open for controversy.

Mr. CURLEY: As to the question of receivership, of course, my familiarity with this case is limited even more than that of Mr. Pattee, but I know that that was a matter that was gone into originally—was fought out originally, and it was determined then that a receiver was proper. The question of attorneys' fees was also gone into originally. The court made an allowance at that time in deciding the
277 case, that the Supreme Court of the United States has practically determined was a proper decision, and I know from my talks with Mr. Hereford that he is laboring under the impression that in the receivership matter there are matters that are to be determined, and that receivership is necessary in order to properly wind up the affairs of this corporation and to make such distribution as is proper.

The COURT: Have you anything to say on the attorneyship proposition?

Mr. CURLEY: What is that?

The COURT: Have you anything to say on the attorneyship proposition?

Mr. CURLEY: Well, I say on the attorneyship proposition that as I recall the sum of 10% of recovery was allowed.

The COURT: On the second cause of action.

Mr. CURLEY: That was as I recall it, and Mr. Pattee will correct me if I am wrong. The judgment that is being rendered by the court now was substantially rendered at the first trial of the case by Judge Campbell.

The COURT: Well, no. It was substantially rendered by the trial court on the second cause of action. But as to 10% attorneys' fees, there were no attorneys' fees allowed on the first cause of action because judgment went for the defendants.

278 Mr. CURLEY: Now the Supreme Court of the United States has affirmed the second cause of action. This case has been to the Supreme Court of the Territory twice.

The COURT: Yes.

Mr. CURLEY: Now the first time, as I remember it, judgment was rendered for Mr. Zeckendorf all down the line.

The COURT: Yes, but that was reversed so that judgment does not stand.

Mr. CURLEY: Well, I was just talking about the question of attorney's fees—that that question at that time was threshed out, and the court, as I remember, determined at that time that that was a proper attorney's fee,—10% on the total amount. I am simply citing that as an illustration—not for the value of the opinion as an opinion; but that that was at that time determined to be a proper attorney's fee.

The COURT: Now, in answer to Mr. Pattee, I haven't searched the records, as I say, in this case any further than to read the opinion of the Supreme Court, the decisions of the Supreme Court of the Territory and the Supreme Court of the United States, but I would venture to say that if you read the records you will find that there is no evidence given in the original case as to the value of the attorneys' fees, but, as a matter of course, the court rendered judgment
279 for attorneys' fees in the sum of 10%.

Mr. PATTEE: Your Honor is in error about that. I think Judge Nave was sworn and Mr. Ben Goodrich was sworn on the first trial. I think the record will bear me out in that.

Mr. CURLEY: Well, as I say I am not familiar with that record. I cannot talk about that record.

Mr. PATTEE: Perhaps that does not appear in the printed record, because that subject was a mere incidental one—went with the rest of the judgment, and perhaps counsel did not see fit to make any special point on that. But that was the fact. Witnesses who were experts were sworn and testified on the subject.

Now, then, the court determined on the first trial that the judgment of the lower court should be reversed and put it back right where it was before, like any re-trial of a case. In other words, the first trial was wiped out of existence. There is nothing conclusive about the findings on the first trial.

The COURT: No, that would have nothing to do with it.

Mr. PATTEE: Now, as I say, either the court must determine as a matter of law without proof that there is a rule of law, an established rule of law which fixes a definite minimum price, or else the subject is open to the introduction of proof by the parties and to the determination of the court.

280 Mr. CURLEY: I am not sufficiently familiar with the record, if the Court please, to go into that matter. My impression was, and I know Mr. Hereford's impression and Mr. Meserve's impression was that that matter was to be finally determined by the court at this time. Of course, if there had been any feeling that there was to be anything left open either Mr. Hereford or Mr. Meserve would have been present. I am appearing here more formally than anything else, and although I am not familiar with this case I know that was the understanding that the parties had insofar as our side of the case is concerned.

The COURT: The matter of the receivership having been passed on by the Supreme Court of the Territory and the Supreme Court of the United States, the order appointing a receiver will not be interfered with or modified by this court at this time. How much money will come into the hands of that receiver? Have you any idea, Mr. Pattee?

Mr. PATTEE: Why,——

The COURT: Three hundred and some thousand dollars?

Mr. PATTEE: Three,——

The COURT: It is Three Hundred and twenty-eight or three hundred and fifty-eight thousand.

Mr. PATTEE: I don't recall the figures.

281 Mr. JONES: I think it is \$328,000, something like that.

Mr. CURLEY: Something in the neighborhood of \$328,000.

The COURT: \$328,000 I think it is.

Mr. CURLEY: Whatever it is.

The COURT: Any suggestion from counsel as to the amount of the bond required?

Mr. CURLEY: I should think a bond for that amount would certainly be ample. I would not suggest any more than that.

The COURT: I would be glad to hear from both sides on that proposition. It would necessarily probably be a bonding company bond, a security company bond, and that would cost something.

Mr. CURLEY: In all probability it would be a security company bond.

Mr. PATTEE: I would say, if your Honor please, the receiver is a gentleman of very high standing in this community, and it would really make very little difference whether he gave any bond or not. We have the utmost confidence in his integrity, so I am indifferent whether he gives a bond or not.

The COURT: It is only a matter of saving to the estate if you get a security company bond.

Mr. PATTEE: The receiver is Doctor Fenner, a gentleman of the highest character.

The COURT: I suppose it would charge him at least \$5.0
282 a thousand.

Mr. PATTEE: I suppose so.

Mr. CURLEY: It would be expensive, but whatever the court thinks is right about it.

The COURT: Enter an order, Mr. Clerk, fixing the bond in the sum of \$100,000.

Mr. PATTEE: I am not at all particular about the bond.

The COURT: The bond will be fixed at \$100,000 and to be approved by the court.

As to the matter of attorneys' fees, the court, the trial court, at the last trial in its judgment rendered judgment in favor of the plaintiff in the sum of 10% of the amount recovered as attorneys' fees on the second cause of action. There could necessarily have been no order made as to the attorneys' fees on the first cause of action, because judgment went against the plaintiff on that. The matter was not discussed as to the attorneys' fees in the first cause of action either by the Supreme Court of the Territory or by the Supreme Court of the United States; the Supreme Court of the United States simply remanding the case for such further proceedings as would not be inconsistent with their decision.

It was the intention of the court to wind this matter up definitely at this time. However, that question of attorneys' fees seems
283 to be one of great importance, and while I would not want to grant any great length of time, on the proper showing which would convince the court it is necessary, the court would be willing to grant a limited time. I would like, however, to take that matter under advisement until tomorrow. I will stay over and look the matter up as a matter of law, and if I think you are entitled to showing I will grant it; if not, I will render a judgment on that. I would be glad to have some assistance from the counsel on the matter any authorities on the proposition that you may find. At present I will only continue that part of the case until tomorrow morning 10:00 o'clock.

Mr. PATTEE: I would gather from your Honor's remarks that it is only for the purpose of finding what your Honor's duties in the premises are—not for any further—

The COURT: No, if I find from the authorities or from authorities presented by the counsel that you are entitled to a hearing, I will grant it.

Mr. PATTEE: My understanding of it simply offhand is that the right to recover 10% attorneys' fees at all is only granted—if there be such a case—is only granted in exceptional cases. Granting that this is such a case, nothing more than reasonable attorneys' fees can be recovered. Of course, there can be no percentage in this case
the contract.

284 The COURT: Oh, no.

Mr. PATTEE: So the percentage would only be of aid to the court in determining what would be the most reasonable fee, giving it the utmost effect. Now, we can conceive of a case where a certain percentage might be too low or too high. There is nothing, as I said,

cabalistic about 10%. That is simply used as a basis for figuring, but necessarily the court must have proof. To be sure, a judge who has heard the whole case from beginning to end may supplement the proof with his knowledge of what has been done, but that is never in itself a complete basis for fixing these fees.

The COURT: Those are the points that I want submitted.

Mr. CURLEY: I would be glad to bring in anything I may find on the subject.

The COURT: In a case of the importance of this where the attorneys' fees are as large as they are here, I think counsel are entitled to some time to try to convince the court. If you are able to convince the court by tomorrow morning at 10:00 o'clock, the court will grant you a hearing.

Mr. JONES: Now, if your Honor please, there is still the question of interest. If your Honor will grant me a minute I would like to make a statement, because I am familiar with what happened at the argument and since the argument. Counsel for the defendant thought that it was unnecessary to argue anything but the main proposition whether any judgment at all should be entered at first, and in a supplementary brief Mr. Ives requested the court to hold out the question of interest, the question of the appointment of the receiver and the question as to the attorneys' fees, in which request he also asked that if the court should be of the opinion that a judgment should be entered against the defendant, he would like to have further time in which to present his authorities and his argument on those three matters. Now in order that I may be straight about it, and I may be able to inform Mr. Heney and Mr. Ives correctly, I just wanted to know whether that request is denied and the court has rendered a final judgment against us on the receivership and the interest, but has left open until tomorrow morning the question as to the attorneys' fees? Is that correct?

The COURT: That is correct. The proposition is this: that this case might be kept open for the next two years if we permitted counsel to come in and argue the case, as we supposed as a whole at the time, and had opportunity to present their entire argument, and then after the case is heard they filed briefs, and then made a request to be heard further on some other proposition not discussed at that time. This case is one of considerable importance to both parties. If the plaintiff is entitled to this money at all he is entitled to it at the earliest possible date that the law will allow, and the court would not be justified in continuing the hearing from time to time and keep it stringing out over a year, because if I should permit further argument there would be briefs submitted and then it would require sixty days to read those briefs. Then they would come in with another proposition; and the court is clearly convinced that the plaintiff is entitled to judgment as granted.

Mr. JONES: If I may just say a word, I will say that at the time that this request was made—I may say authoritatively Mr. Ives intended to mean that if your Honor should be of the opinion that a judgment should be entered against the defendant you would so

inform him and then he would have the opportunity before your Honor entered any judgment at all to discuss those questions.

The COURT: The only thing the court remembers is Mr. Ives request by letter.

Mr. JONES: We filed a supplemental brief with the Clerk in which we made that request.

The COURT: And the court wrote both parties that he would hear no further argument unless both parties consented to it. I think that was my answer if I am not mistaken.

Mr. JONES: I can state that I don't think that we received
287 any such letter, except in the last two or three days.

Mr. CURLEY: I know we received a letter stating that there would be no further arguments.

The COURT: I mean did not you receive such a letter a month or six weeks ago?

Mr. CURLEY: I could not state, because this is a case I haven't paid any attention to. Mr. Hereford has handled it.

The COURT: Well, I am quite confident that you did, but if you did not you were informed that the court would not hear further argument.

Mr. JONES: No, we were not informed that you would not hear further argument.

The COURT: The presumption is that when the party is given an opportunity to make the argument and does make it, that he will make it full and complete on all the propositions raised, as was made in this case.

The case may be continued until tomorrow morning at 10:00 o'clock.

Mr. CURLEY: On the one question?

The COURT: Yes.

287½

Second Session.

(Tuesday, June 17th, 1913.)

Appearances:

For the Plaintiff, F. E. Curley, Esq.

For the Defendants, S. L. Pattee, Esq., Gerald Jones, Esq.

For the Receiver, S. M. Franklin, Esq.

288

TUESDAY, June 17th, 1913—10:00 A. M.

Court met pursuant to recess:

Present: Mr. F. E. Curley, Mr. S. L. Pattee, Mr. Gerald Jones, Mr. S. M. Franklin.

Mr. JONES: If your Honor please, yesterday we made our application for an extension which your Honor denied. Now I don't want to be put in the attitude of being impertinent, but at the same time I feel that it is my duty to call attention to certain matters which might influence your Honor in the consideration of that application.

and also in consideration of the proper form of judgment, which will not take me a great length of time.

As I stated yesterday both Mr. Heney and Mr. Ives are obviously absent. We did not expect the court to enter a final judgment on all questions at this time, and we are unprepared to discuss what the judgment should contain at this time. Your Honor yesterday said that a letter had been written to the attorneys notifying them that further argument would not be heard. I have searched the files in the office and I have been unable to find the letter so that it must have miscarried in the mails.

289 The COURT: The court did not make that absolute statement. The court said that he might have laid the communication on the desk and failed to answer it, but I was of the opinion that I answered it.

Mr. JONES: Of course, I do not know whether Mr. Hereford received it or not. Mr. Curley can probably say.

Now, even though your Honor still adheres to the notion that that application should be denied, when we come to consider the judgment itself perhaps your Honor may be influenced by the expressions that appear therein.

In the first place, if we had the time we would attempt to show that a receiver in this case is entirely unnecessary.

Mr. CURLEY: Just a moment, do I understand that your Honor is going into an argument of this question at this time?

The COURT: Why, I don't see any use of it.

Mr. JONES: If your Honor please, I would like to be heard even though your Honor feels that he will deny the application.

The COURT: Not only will, I have denied it. The court has denied it.

Mr. JONES: But your Honor must enter at this time a formal judgment, and one of those questions should be the question
290 of the appointment of a receiver, and I think even on that ground I am entitled to be heard.

Mr. CURLEY: That has been passed upon.

The COURT: The court yesterday entered judgment.

Mr. CURLEY: And the only matter open is this question of attorneys' fees.

The COURT: And the only matter open is the question of attorneys' fees.

Mr. CURLEY: That is the only question.

Mr. JONES: That is, if your Honor has decided that, I think we ought to have the right at least at some time or other to discuss that question and these various questions.

The COURT: The court does not care to hear any argument on that subject at all.

Mr. JONES: May I discuss certain defects which are apparent on the face of this motion for judgment, which I have discovered during the course of a night's study?

Mr. CURLEY: I object to that. That matter has all been argued by the regular attorneys in the case.

Mr. JONES: I dispute that the form of this judgment as it appears in this case has ever been argued, and that the sole question—

Mr. CURLEY: Well, we will object to any further argument at this time.

291 The COURT: One at a time.

Mr. JONES: I did not hear your Honor.

The COURT: I say one at a time.

Mr. JONES: And that the sole question that has been argued by the attorneys for the defendants, at least, is whether any judgment should be entered. We never have entered into the various items of that judgment. If your Honor is not going to give us further time to argue that question, at least I should have the time now to point out wherein that judgment is obviously defective, and I can do so. I can show your Honor that there is an item there in that judgment giving interest on money held by Mr. Steinfeld subject to a writ of garnishment, which he had to hold—6%. I can show your Honor where interest is compounded in that judgment. I can show your Honor that it has been stated by the attorney for the receiver that it is defective because it does not specify the duties of the receiver; and I think I can show other items that would preclude your Honor from entering that judgment against us. I can show your Honor where there is a discrepancy of \$4,000 between that judgment and the judgment Judge Campbell entered some years ago in 1905, which was agreed by all the parties to express the proper amount. Now I think I ought to have the right to go into those defects at this time.

The COURT: Then what you are asking now is that you
292 be permitted to argue as to the form of the judgment.

Mr. JONES: Yes.

The COURT: But you started arguing on the proposition of the appointment of a receiver. That matter was disposed of yesterday. It is admitted by the court that the form of the judgment is open to argument, as it always is.

Mr. JONES: That is just exactly what we want—time to argue the form of the judgment.

Mr. CURLEY: Now, if your Honor please, this form of judgment was submitted to the court along with the motion for the judgment, and it was argued by Mr. Hereford very elaborately in his brief. Now if counsel have abstained from entering into an argument as to the merits of this judgment, or as to what it should contain, it seems to me that counsel have been very careless in their duty to the court, for the reason that this whole matter has been submitted to the court and the whole matter has been argued both orally and in brief, and the court has indicated that at this time it would render a full judgment in the case. Now if there is to be any further argument on this question, then I simply ask the court that I be relieved in the matter, because it is a case that I would not enter into any argument on. I am not prepared to do so. The matter

293 has been fully argued by the regular counsel. It has been briefed by the regular counsel, and it has been submitted to the court.

The COURT: Well, the proposition as stated by the court—when the court enters judgment on any proposition the judgment that is then entered, of course, is the real judgment, and the written judgment is simply the formal judgment, and it is usual to submit the formal judgment to the opposing counsel and the court before it is signed and filed.

Mr. PATTEE: With an opportunity to correct it.

The COURT: And as I understand it, their request was to discuss the formal or written judgment.

Mr. JONES: That is it.

The COURT: And I will permit them to do that—make any objection that they see fit at this time.

Mr. CURLEY: Of course, your Honor will take the course that your Honor sees best in that matter. But as far as I am concerned I do not want the court to expect me to enter into any discussion at all, either as to the form, or the merits.

The COURT: Have you a copy of that judgment?

Mr. JONES: I have a copy.

Mr. CURLEY: I have a copy here.

The COURT: Let me have it, please.

Mr. CURLEY: Because, as I stated to your Honor yesterday, this is not a case I am prepared to go into.

294 The COURT: What the court wants is for counsel to point out what they claim to be defects in the judgment, and give the reasons upon which they base their claim.

Mr. JONES: Of course, if Mr. Curley don't want to argue this, we do not want to take any advantage of him. We will submit our propositions in writing.

Mr. CURLEY: You say the motion that you are asking for is that the judgment is defective. If you have anything to submit to the court, submit it.

Mr. JONES: The things I have to submit are not complete. I am employed by one of the attorneys in this case. I don't profess to be able to point out all the defects in that judgment, all of the obvious defects in it. I can point out only the defects that I have discovered in several hours' work on it. But they are so obvious that certainly that judgment as composed can never be entered.

Mr. CURLEY: You have had that form in your possession practically sixty days.

Mr. JONES: I have explained why we did no object to it yesterday.

The COURT: Proceed with your argument. If you have any argument to make, address it to the court.

Mr. JONES: Now, in the first place, the judgment in the fourth clause provides for judgment against Mr. Steinfeld for
295 \$25,750.

The COURT: In which clause?

Mr. JONES: Fourth clause, page 9. Now, of course, this judgment must be based on the pleadings and on the findings of fact in this case. That \$25,750 your Honor, is one-half of \$51,500 which was garnished in an action brought by Mr. Franklin against the company for attorney's fees. By some arrangement Mr. Steinfeld assum-

ing the responsibility above half of that amount turned back to the corporation, I assume for distribution among the stockholders, half of it, and retained the other half subject to the writ of garnishment. That happened on January 16, 1904. Now, mark you, that \$25,750 was held from that time on by Mr. Steinfeld to answer Mr. Franklin's suit. It afterwards did answer that suit to the extent of about \$10,000. Now, by what reason or rule can Mr. Steinfeld be charged with interest on \$25,750 when he had to hold it under a writ of garnishment? Now that is one defect that I have found within a few hours. I am not familiar with this case like some of the attorneys here and I cannot urge all the defects, but that is one of them.

I will state that Judge Campbell handled that \$25,750 in an entirely different way. He did not give judgment against Mr. Steinfeld for that, but he required him to account for it. If your Honor
296 will examine the judgment entered by Judge Campbell in 1905, you will find that is a fact, and that is a part of the records in this case.

Another defect is in this: at the time the judgment was entered in 1905 all of the attorneys got together and agreed that the amount therein stated was the correct amount. When you calculate the interest from that time down to date you will find that there is a discrepancy of over \$4,000 between that judgment and this judgment. Furthermore, in 1908 when the judgment was entered, as is provided in the second clause of the first judgment, the plaintiff recovered the sum of \$20,850 on the second cause of action, which was affirmed; that judgment reading, "with interest thereon at the rate of 6% per annum from the 20th day of January, 1904." The clerk has docketed it just in the language of the judgment. In other words, that judgment carries interest from January 20th, 1904, at 6%, and if we paid that amount we would satisfy that judgment. And yet in this proposed judgment it is calculated from that time to July, 1908, added to the principal and interest compounded. Now, why should we pay that? That is another defect in this judgment that I have found in this short time.

In the third place, Mr. Steinfeld paid out on behalf of the Silverbell Company \$12,750 to the attorneys and claimants. It is found as a fact that that money was paid for the benefit of the company.

Judge Campbell allowed that \$12,750, deducted it from the
297 amount found at the time, and gave interest on that amount from then on. In other words, he allowed interest on \$12,750 from the time it was expended to the present time. And yet this judgment makes no provision whatever for that amount, unless it would come under the head of the auditing, and there it does not allow Mr. Steinfeld any interest at all on these monies that he has paid out. That is another defect that I have found in the course of the short time I have had that is obvious on the face of this judgment.

Now, there are other defects it seems to me must be clear. At least, there must be some question about it. If I can find these objections in the course of a little time like this, why, upon a close analytical study of this judgment we could tear it to shreds, and I

say we ought to have time to go into it thoroughly—time to do that which we have not yet had time to do. They cannot lose anything by it. The judgment was entered yesterday; as your Honor said, the formal drawing up of that,—it makes no difference when that is done. That judgment carries interest from yesterday. They don't lose anything, and I think your Honor ought to give this matter the most thorough consideration—examine the findings of fact, examine the pleadings and see whether this form corresponds to them.

298 Your Honor denied me the right to discuss the question of receivership and the question of interest, but we have a powerful argument. I won't encroach further on that ruling than to say that the item of interest in this case is over \$150,000, and I say we ought to have time further to argue at least as to the form of this judgment.

Mr. PATTEE: May it please your Honor, in addition to what Mr. Jones has pointed out as corrections which appear ought to be made on the face of the judgment, there are one or two other things which I want to call your Honor's attention to. The record in this case shows the testimony shows that one Mr. Neilson—the finding also shows and various documents which are a part of the record which the court, of course, takes judicial notice of—brought a suit against Mr. Steinfeld and the Silverbell people claiming certain shares of stock involved in this second cause of action. That litigation appeared when to be pending, and I don't know as it has become a sufficient matter of history for the court to take judicial notice now of the fact that it is still undetermined or not; but, of necessity, no court will require Mr. Steinfeld to pay twice. If he has to pay Mr. Neilson he does not have to pay this receiver, but if he pays the receiver, then the receiver will be required to hold that money, the proceeds of that cause of action, subject to the result of that litigation. The
299 Silverbell Copper Company is a part of that suit. It is the real plaintiff from a lawful standpoint in this suit, and the decree—whatever may be rendered in that case, and the case is now pending in the Supreme Court of this state, and if my view of the law is correct, with a possibility of review by the United States Supreme Court—may require the holding by the receiver of the proceeds of that cause of action to await the result of that litigation, to determine to whom he shall pay it, and to enable the court to determine what orders to make with respect to its payment. That is another thing that is wholly unprovided for.

There is one trifling matter not contained in the decree—not trifling perhaps, but that we all overlooked yesterday that Mr. Franklin called my attention to. Your Honor stated, probably inadvertently; that the bond of the receiver should be approved by the court. Mr. Franklin calls my attention to the statute which states that it shall be approved by the Clerk.

The COURT: By what?

Mr. PATTEE: Shall be approved by the Clerk. I just simply call your Honor's attention to that.

The COURT: That is a formal matter.

Mr. PATTEE: A formal matter. That, of course was not in the decree, but I take this opportunity to call your Honor's attention to it. Now that in addition to the other things is something that
300 adequate provision ought to be made for in this decree. There ought also in my judgment to be a general provision at the foot of the decree in accordance with the equity practice holding it open for further orders—further application as conditions may arise and require. This is one of those cases where finality in the sense that conditions may arise that require modification or a change of orders, or something of that kind, requires some such provision as that. Although the decree may be final in a legal sense, there ought to be that reservation at the foot of the decree.

The COURT: Oh, that reservation is supposed to be in all judgments or decrees appointing a receiver to wind up the affairs.

Mr. PATTEE: But it isn't. It ought to be in there. All those things,—as I say, Mr. Jones has given the decree some study. I have not because my connection with this case ended over a year ago and commenced again yesterday. So that the unfortunate absence of the counsel who has given this much thought may be the cause of our overlooking something which will be a source of lasting regret to both the court, the counsel, the parties and everybody connected with the case. That is as to the form of the judgment.

The COURT: The court regrets very much itself that the counsel for both sides are not here; that is, the leading counsel; They are supposed, at least, to have the same knowledge that the court
301 has of the clause in the Constitution that the Superior Court must decide all cases within sixty days from the date of submission, and the last brief in this case was filed on the 21st day of March, or the 21st day of April, I believe. Therefore, the sixty days would expire on the 20th day of June, and I take it the court would have no power to carry the decision over the sixty days without the consent of both sides. And as stated to both sides in a letter recently written, if they had agreed I would have postponed judgment, but no such stipulation having been filed the court feels it is its duty to decide this case within sixty days.

Mr. PATTEE: Well, the court has decided it. The court decided it yesterday. These are merely matters as to the form of the decree. It is a common practice in courts of equity to take any amount of time to permit counsel to settle it between themselves, if possible, if not, have it settled by the court in chambers, or the judge while off the bench.

The COURT: Have you anything to say on the matter of counsel's fees?

Mr. PATTEE: I have, your Honor. I have some authorities which I will submit to you. In the first place, I want to call the court's attention to the general proposition that counsel's fees or attorneys' fees in a case of this kind are not at all a matter of right. In
302 these stockholders suits brought in behalf of the corporation, the theory upon which they are allowed—if my understanding is correct—is that the minority stockholder who comes in to redress the wrong done to the corporation, or to enforce the rights of

the corporation for the benefit not only of himself but all the stockholders, and he succeeds in doing so, he is entitled to reimbursement for his expenses, or practical reimbursement, as the case may be, in order that all who benefit by the litigation may share in the expense of it. It is an equitable proposition that in a proper case is highly equitable. The record in this case all the way through shows that while this is a suit brought ostensibly by Mr. Zeckendorf as a stockholder of the Silverbell Company, he is a very large stockholder, and that the real parties litigant—notwithstanding the ostensible form of the action—are Mr. Zeckendorf as plaintiff and Mr. Steinfeld as defendant, and there is no more reason for bringing this case within the rule than there would be in an action between Mr. Zeckendorf as plaintiff and Mr. Steinfeld as defendant. The recovery in this case is for the benefit practically of those two men. So far as Mr. Zeckendorf's enforcement of this cause of action is concerned, it is entirely for his own benefit, and not such a case even as where a stockholder holding a few shares—perhaps your Honor has read the case, a Montana case, one of the celebrated Heinze cases, where a
 303 stockholder of a few shares sought to upset a fraudulent scheme, slightly for the benefit of himself and largely for the benefit of the other stockholders. Somebody had to do it. He assumed the burden of doing it and he was allowed his expenses for doing so. In this case the record all the way through will show that this is a suit by Mr. Zeckendorf to get back the money which he claims was fraudulently obtained.

The COURT: The answer to that is in the decision of the Supreme Court of the Territory.

Mr. PATTEE: That is very true. But it is like any other case where the court don't review the propriety of the thing, but they simply passed upon the question whether the trial court stepped so near the pit as to fall into it.

The COURT: Well, the Supreme Court has said that it did not.

Mr. PATTEE: But when a reversal takes place and it comes back for a new trial it stands for trail, de novo, both as to matters of discretion and matters of fact, and we are entitled to the benefit of the discretion of this court.

Mr. CURLEY: This court has just stated it did not come back for that purpose.

Mr. PATTEE: Not as to this first cause of action?

304 Mr. CURLEY: Yes, as to everything.

The COURT: While this court is willing to exercise the power and authority and jurisdiction conferred upon it by the Constitution and laws of the State of Arizona, it does not believe that they give this court the authority to set itself above the Supreme Court and to set aside a ruling made by the Supreme Court. And the Supreme Court has said on this proposition that the trial court did not exceed its authority, and that the trial court was reasonable in its judgment on the matter of attorneys' fees. I take it therefore that that would be binding on this court in this case.

Mr. PATTEE: Well, possibly your Honor in the exercise of an independent discretion may feel that way. That was merely prelimi-

nary as showing a basis that there could be an argument made against attorneys' fees.

The COURT: The argument that I supposed would be made this morning was as to the amount.

Mr. PATTEE: Well, that I will proceed to right now. Now, the first judgment in this case—I looked up yesterday, or Mr. Jones looked up, and I also fortified myself—verified the correctness of my statement as to the introduction of evidence on that trial. I find that the evidence was introduced and it was thought to be so important by counsel for the plaintiff that he placed it in a supplemental abstract of the record and passed it up to the Supreme Court in support of his argument that that was a proper amount. Now
305 the recovery in this case was for some two hundred and some thousands. The allowance for attorneys' fees was \$6,000, very much less than 10%. And whatever accretions may have come to the amount of the judgment since is simply the interest that has flowed from the delay in the ultimate entry of judgment. But my point is, as I stated yesterday, that no fixed percentage is at all controlling, or is even to be considered except as it may—as 10% sometimes is taken as aiding the court to some extent in considering what is a proper charge.

The COURT: I don't think you need to cite any authorities to the court on that proposition. It is not a fixed rule.

Mr. PATTEE: But the question is whether the court may from its own knowledge of the record or without proof fix attorneys' fees; and I call your Honor's attention to the case of—well, I cannot pronounce the name of the case. It is a long German name.

The COURT: Read the case.

Mr. PATTEE: This was an action to foreclose a mortgage in which the mortgage provided for reasonable attorneys' fees, and after discussing the merits of the foreclosure suit, which are not at all important, the court proceed. This is the Supreme Court of Wisconsin, 13th Northwestern Reporter:

"We think the record discloses another error. The mort-
306 gage in suit contains the stipulation that in case of its foreclosure * * * or from his personal knowledge of the services rendered."

Now, I call your Honor's attention also the case of Dexter, Horton & Company vs. Long, 27th Pacific, 271, the Supreme Court of Washington, another action in foreclosure in which the principal discussion is, of course, as to the merits of the foreclosure suit, but the last paragraph reads:

"We have examined the other points raised by appellant and are unable to find any error * * * the case will be remitted to the lower court with instructions to modify the judgment in accordance with this opinion."

I also call your Honor's attention to the case of Kellogg vs. Singer Mfg. Co., 17th Southern Reporter, in which the same question was considered by the Supreme Court of Florida.

"The mortgage provided for the payment of reasonable attorneys' fees in the event of foreclosure, but it was error for the court to

allow the \$60 without proof that such sum was a reasonable fee in the case."

Citing various other Florida cases.

"The record shows that the case was heard on bill, exhibits and answer, and the attorney fee was allowed by the court without any evidence showing it was the proper amount to allow. Under our practice this was error."

Now, so much as to the cold question of law as to whether the court must hear evidence as to a thing like that. It seems to me at least the numerical weight of authority is that way, and it would seem that the reasoning of the position were with these authorities that I have cited. It forms an issue. It must be pleaded in order to be recovered. The plaintiff asserts in his complaint that a certain sum is a reasonable attorney's fee. The defendant denies it. That forms an issue to be tried, and it is tried as any other issue or the proof submitted by the respective parties.

Nevertheless there are a few cases that hold that the court may from its presumed knowledge of the value of attorneys' fees fix them if there is no other objection. But no court goes so far as to hold that the court may not hear proof if he wants to. Here are these defendants in the attitude of requesting a chance to offer proof, and are even in a position that covers any phase of the subject, whether as a matter of law it is the duty of the court to hear proof or whether the court simply may without proof if the parties see fit to waive the chance or the opportunity to offer any proceed upon its knowledge of the case. And I cite your Honor one of the cases of that character.

This is the case of *Clancy vs. Plover*, a California case, 40th Pacific, page 395-394. This was a mechanic's lien foreclosure. It seems that under a statute of that state a reasonable attorney's fee is allowed in that class of cases. The court did allow an attorney's fee upon its own consideration of the evidence and what had been done in the case without proof.

"We think, therefore, that the failure of the plaintiff to produce evidence on that question does not effect the validity of the judgment awarding such fees. * * * that the fee fixed by the court is unreasonable, which is not claimed in this instance."

Now, granting that the court may if nobody offers any proof fix the attorneys' fees from the knowledge that it acquires in the course of the case and from its knowledge on the subject generally, it would have been a very different proposition if the defendant had offered proof that the amount sought to be recovered was unreasonable or the court had rejected that testimony or denied him the opportunity to offer it. And that is as far as any of the courts go—that simply where the parties remain still and offer no evidence or don't say, then the court may of his own knowledge fix a fee in such an amount as he thinks proper—that, as against the numerical weight of authority and against my notion of the reasoning of the rules of pleading or of the rules of evidence—the ordinary rules of trial issue. But even with the minority view, you might call it, of the authorities, no court goes so far as to hold that the party may not offer evidence, or

may not have the opportunity to offer evidence on that subject if he seeks it.

Now, even in this case which held on the question of the receivership, where the compensation of the receiver is to be allowed and fixed, the ordinary method is to take testimony of members of the bar familiar with that class of litigation to aid the court in fixing the amount to be allowed. Instances have occurred where the court fixed the fee without any testimony, but they were usually in cases where the receivership involved a large corporation, and your Honor knows that in those cases, a receivership of a large line of railway practically takes the entire time of one judge to handle the numerous and innumerable matters that come before a court in the course of a receivership. The court acquires the most intimate knowledge of everything that is done by counsel; the atmosphere that surrounds the trial of the case and the hearing of matters and the performances of services all concern the court, and the judge is as well posted as the counsel themselves as to the services performed, the character of the services and of value, especially a judge residing in the community and familiar with all the history of the litigation. Yet the courts are cautious even in those cases in limiting the right of judges to fixing fees under those circumstances to judges who have personal knowledge of the various steps that have been taken in the case and the various services performed.

The case of Hickey vs. Parrot Silver & Copper Co., 79th Pacific page 698, in which Judge Clancy fixed a very large attorney's fee for one of his receivers, contains the following in the opinion 310 of the court in that case:

"Evidence relative to the compensation of the receiver and the allowance of counsel fees * * * and it is for its own enlightenment that such evidence is heard.

Now there is no judge at present on the bench that comes within that statement. I doubt if your Honor begins to appreciate how much has been done or not been done in this case. I doubt if your Honor has any knowledge even gained from the record that would enable you to fix a just and proper fee for the services of any counsel in the case. So many things enter into the value of the services of counsel. It is not alone the work done, although that is an element it is not alone the result, although that is an important element. It is the personal standing and character of counsel and a dozen other things that enter into the valuation of services, and the various amount of work done and research required and a dozen and one things that no judge not personally familiar and who had not personally heard the case from its inception can feel in his own mind that he is doing the proper thing in fixing any specific amount without some proof. And still less can he say that he is so thoroughly satisfied that he will deny to one seeking to throw light on the subject the opportunity to do so.

The COURT: The answer, Mr. Pattee, possibly to that is that the matter appears to the court to have been passed upon by the trial court which has settled it for all time in a finding made by the trial court.

Mr. CURLEY: Which has been approved by the Supreme Court.

The COURT: And which has been approved by the Supreme Court of the Territory and the Supreme Court of the United States, to the effect that 10% was reasonable attorneys' fees on the amount allowed, or on any amount to be allowed.

Mr. PATTEE: Well, I don't conceive, your Honor, that the construction of that language would apply to the amount recovered. It was not to be supposed that the court in rendering judgment for the defendant should anticipate that some contingency might arise in which some other amount should be allowed. You may remember that the second cause of action involved an accounting. There was an accounting all the way through that, and it was in reference to that that the court used that language. The very idea that on the first cause of action the court finds that it is less than about half of 10% makes it appear obvious that the court never intended any such percentage as that. The same judge that found on the first cause of action used that language as a matter of caution.

The COURT: I might say it is obvious that the court did not intend it to apply to the first cause of action, because when it did find
312 upon that, it found upon an entirely different ground.

Mr. CURLEY: As your Honor is doubtless aware, this litigation has been pending about eight or nine years. The first trial in which there was something like \$240,000 involved the court made an allowance of \$15,000. That case went to the Supreme Court and was reversed and came back, and the record was again submitted to the court. Under the ruling of the Supreme Court at that time the court divided its judgment whereby it gave judgment for Mr. Steinfeld on the main cause of action and Mr. Zeckendorf on the second cause of action. Now, in the findings at that time—

The COURT: That is upon the second trial.

Mr. CURLEY: Upon the second trial. No specific allowance was made but the court must have had in mind the possibility of the Supreme Court being in error by reason of the fact that the court in his original judgment—in its original judgment differed from the Supreme Court of the Territory as to what that judgment should be. As a matter of fact the lower court in its original judgment gave judgment for practically the same results that your Honor is giving judgment now, and along practically the same line indicated by the Supreme Court of the United States. So that those things must necessarily have been taken into consideration, and the lower court
313 evidently did take them into consideration. Now the court made this finding, and the language is very suggestive;

"This action is prosecuted by the plaintiff above named as a stockholder of said defendant, the Silverbell Copper Company * * * that 10% of the amount for which judgment is finally given in this action is"—not only is but "will be a reasonable amount to be allowed plaintiff as a charge against said Silverbell Copper Company as attorneys' fees for the bringing and prosecuting of this action for its benefit."

That finding was expressly adopted by the Supreme Court of the Territory and stands as the law in this case today. It has never been

changed. That is just as much so as the finding that Mr. Steinfeld holds for the Silverbell Copper Company so much money. That is the situation. Proof was introduced by his attorneys. The court heard the proof and decided the matter.

Mr. PATTEE: There was no proof on the second trial.

Mr. CURLEY: The record on the second trial was submitted back to the court. In the second trial of this case everything was submitted back to the court, and the court had this before it when it decided that 10% is and will be a reasonable fee. That has been adopted by the Supreme Court of the Territory and approved by the Supreme Court of the United States.

Mr. PATTEE: May it please the court, that finding is clarified or explained by the judgment itself, which is twenty seven hundred dollars, showing what the court meant by that.

Mr. CURLEY: No, not for the judgment that may be entered in this case, but for any sum that may be recovered, any judgment that may be entered in the case.

Mr. PATTEE: The judgment that was entered—I am speaking about what they did.

Mr. CURLEY: Yes, but that isn't the finding.

Mr. PATTEE: The Supreme Court of the United States, it is obvious from their opinion, never considered that question at all in the second trial, the second set of appeals. It was not in issue. It was not argued. The \$2750, or whatever the amount may have been, was not a subject of discussion, was not a subject of assignment of error. It is not supposed that the court finds for the defendant and then uses that language on the supposition that he is wrong. It is fitting language and can only be fitting in connection with the requirement that Mr. Steinfeld shall account for certain sums of money which may increase or decrease the amount of recovery—probably increase it.

In that connection it is fitting language. In no other connection could it be. With the court finding for the defendant and dismissing the cause of action on the merits, it is not to be supposed that he went deeply into the question of attorneys' fees. If it did, 315 with the same thought that it had before the same finding would be presumed to have been made. It was very much less, showing what Judge Campbell thought when he did consider that subject. There is no reason to believe that in a transcript of the same evidence he suddenly discovered that the services were worth over twice what they were before.

The COURT: Judgment in this case will be entered for the plaintiff for attorneys' fees in the sum of 10% on the amount recovered.

Mr. PATTEE: Now, the defendants desire, may it please your Honor, to make a formal offer—at such time as the court's convenience and counsels' convenience may permit—to introduce evidence touching the value of the services rendered by counsel.

Mr. CURLEY: Which is objected to.

Mr. PATTEE: I make that, of course, for the preservation of the record. I make it in good faith. I don't mean I am making perfunctory statement, by any means.

The COURT: You will make it in the form of a motion?

Mr. PATTEE: Yes, I will have to put it in writing, but I offer now—we can make a subsequent motion or modification, or anything of that sort—but I am offering now to introduce evidence upon that subject on behalf of the defendants.

316 The COURT: The offer is denied. The record may show.

Mr. PATTEE: The defendants except.

The COURT: Now when will Mr. Hereford be back?

Mr. CURLEY: Well, Mr. Hereford will come back any time the court will suggest.

The COURT: When will Mr. Heney be here?

Mr. JONES: If your Honor please, he said he could be here on July 1st, the last communication we had from him. I have no doubt that he can still be here at that time, but I can wire him to find out for sure.

The COURT: There are some changes in the form of judgment as submitted that I think possibly ought to be made.

Mr. CURLEY: Any time that your Honor will suggest either Mr. Hereford or Mr. Meserve will come here to take the matter up.

Mr. JONES: While we would like it set any time in July, if your Honor is going on his vacation we would not interfere.

Mr. CURLEY: Mr. Hereford is on his vacation now, but I will say to the court that he will come back at any time the court suggests.

The COURT: It is always proper that both sides read the judgment and it be discussed before it is signed and filed by the court. The judgment possibly should decree the duties of the receiver.

317 I have not read this judgment for sometime. They tell me that it does not.

Mr. CURLEY: There was some suggestion made here that Mr. Franklin, attorney for the receiver, indicated that this judgment was not perfect in that respect. Mr. Franklin has just examined the record and he informed me that it is.

Mr. FRANKLIN: I had not seen the judgment yesterday, your Honor, and I did not know what was in it. Yesterday afternoon I read the judgment; that is, the judgment which was approved by the Supreme Court of the United States, the original judgment in regard to the first cause of action, which appointed the receiver. Now I think its duties are very amply defined in that.

The COURT: You think they are?

Mr. FRANKLIN: I think they are. I think there may be some matters which counsel may agree on. Of course, they are very general in their nature. The details will have to be agreed to by opposing counsel, or else submitted to the court from time to time.

Mr. PATTEE: That is just the trouble

Mr. FRANKLIN: It says that we shall take charge of all this property and then disburse it upon the orders of the court. Of course, by the orders of the court—he would simply disburse it upon the orders of the court, and those orders would have to be made

318 from time to time, I presume, as the matters progress.

Mr. PATTEE: What I wanted; that is, what we are trying to

keep away from is the possibility of paying this second judgment twice, and that ought to be guarded in the decree.

Mr. CURLEY: The receiver necessarily acts under the orders of the court. It is absolutely impossible for the court to even apprehend that at the beginning of a receivership these different turns will arise, and the complications that will arise under the receiver. He necessarily acts under the orders of the court. I don't see how the court could go very much farther than say that he should receive all this money and pay it out under the orders of the court.

At any time the court will suggest why either Mr. Hereford or Mr. Meserve will arrange to come down here to suit the convenience of the court

Mr. PATTEE: Is it necessary to fix a time now, if the Court please?

Mr. CURLEY: The court wants to take a vacation and he wants the matter determined before he goes. As a matter of course, we want this judgment signed and filed and get rid of it.

The COURT: The court will further state that after reading this judgment over and considering it, it might be possible that it meets the requirements. If not, I will make suggestions.

319 Mr. PATTEE: Well, I am particularly anxious about making provisions in terms so that the receiver armed with a certified copy of this judgment may be himself advised as to his duty in the premises.

The COURT: I think you are requesting that the decree include more than the court has any authority to provide.

Mr. PATTEE: No, your Honor, because that is all provided for in some of these other decrees. I am asking your Honor to conform this decree to the others in that respect.

The COURT: The only thing that the court is trying to do in this case is to follow out the judgment of the Supreme Court of the Territory and the Supreme Court of the United States, and I want the judgment to conform with those two decisions, especially the one of the Supreme Court of the United States.

Mr. CURLEY: I would suggest in the absence of all the leading counsel in this case that the only matter that is now open is the form of the judgment, and that the court set some day—if the court wants to hear us, or wants any suggestions from counsel—that the court set some day that counsel will be present.

The COURT: Will ten days be satisfactory for both sides?

Mr. CURLEY: That is satisfactory to us. The judgment is rendered now.

320 The COURT: Yes.

Mr. CURLEY: It is a matter now of getting up the form, and as I suggested before, we want it done before the summer holidays, and we don't want it to go over until fall.

Mr. JONES: Your Honor could not make it July 1st?

The COURT: I will make it July 1st. Let the record show, Mr. Clerk, in this case that counsel is given ten days in which to prepare and file with the clerk a form of judgment—until the 1st day of July, 1913, I should say.

Mr. PATTEE: Now, may it please your Honor, on the judgment I

suppose time for filing a motion—any motions in the way of a rehearing commence today or commenced yesterday, and I desire to state that we intend to file, whether you technically term it a motion for a new trial or not, I don't know, but something in the way of a motion of that character; and the statutes provides for the hearing of that motion within twenty days or they are denied by the operation of law unless the court otherwise orders.

The COURT: File it within ten days.

Mr. PATTEE: And I ask the court to otherwise order now so that they won't simply be denied by operation of law but will be heard.

Counsel, of course, will have then his written form of judgment on record, so that he will be protected.

The COURT: Why not dispose of it July 1st?

Mr. CURLEY: I don't know just what motion counsel can or may file in this matter. But I simply suggest that no order be made at this time, but that the matter take its course.

Mr. JONES: Your Honor, we won't have the opportunity until after formal judgment is entered to point out the particular defects that we think it has.

Mr. PATTEE: It will have to be amended in the nature of things.

Mr. JONES: It will have to be amended in the nature of things, and we don't want to have it signed before it is amended.

The COURT: The answer to that is that the court would not feel justified in extending any time until after your motion is filed. Then the court, if it sees proper, can make an order setting a time when it will be heard and disposed of. The statutes gives you ten days dating from yesterday in which to file your motion and the formal judgment will not be entered before July 1st. You may have until that time and then the matter of extending the time can be taken up on July 1st and disposed of.

Mr. PATTEE: As to the stay of execution I suppose until the formal judgment is entered there can be none, anyway, but I give notice of that, that we shall apply for a reasonable stay of execution.

Mr. CURLEY: What is that, Mr. Pattee?

Mr. PATTEE: I say of course no execution or no steps in regard to this judgment can be taken before it is entered, but I want to simply notify you that we shall apply for a reasonable stay in order to—

The COURT: At the present time you can have a stay of execution until July 1st, which with a proper showing might be extended at that time. Is that satisfactory?

Mr. JONES: You will pass upon it on July 1st?

Mr. CURLEY: And as suggested by Mr. Franklin or Mr. Pattee, the court will require that bond of the receiver to be approved by the clerk?

The COURT: Yes, the state requires that. I overlooked that yesterday.

(Tuesday, July 1st, 1913.)

Appearances:

For the Plaintiff, E. A. Meserve, Esq., F. E. Curley, Esq.

For the Defendants, Francis J. Heney, Esq., Gerald Jones, Esq.

323 The COURT: Mr. Meserve, I believe this is the original judgment as submitted, is it not?

Mr. MESERVE: Yes, your Honor.

The COURT: You may make that correction in there.

Mr. CURLEY: I have added there, your Honor, in the blank, "that the said receiver execute the usual oath of office and give and execute a bond in the sum of one hundred thousand (\$100,000.00) dollars, in the usual form of a receiver's bond, to be approved by the Clerk of this court."

Mr. HENEY: While we are waiting I would like to make this suggestion to the court. As far as the second cause of action is concerned, as to which we freely admit we have no right of appeal and that it is final, the proposed judgment, form of judgment compound the interest, and we would like your Honor to look—inasmuch as this judgment is going to be absolutely final, to look at the form of Judge Campbell's decree there and determine what that amount really ought to be. We claim that it should not be compounded at all; that the way Judge Campbell's decree reads it is for the sum of \$20,000 and interest from a certain date, January 20th, 1904, and we say that should be simple interest, straight interest down to the date this judgment is entered. It makes a difference of about \$16,000.

324 The COURT: In other words, you contend that instead of charging interest on the judgment rendered by Judge Campbell which included interest, that the principal should bear interest up to the present time and not interest on interest?

Mr. HENEY: Yes, And I concede that if the judgment had provided that the judgment should be entered for a certain fixed aggregate amount, that they could then charge interest upon the judgment from that date. But I contend that the judgment on its face reads the other way. That was up to them. Judge Campbell entered the judgment they proposed, I suppose.

Mr. MESERVE: I think you are wrong. Let me just look at it a moment, Mr. Curley.

The COURT: That was one of the issues raised at the time this court rendered judgment on the 16th day of June, and that was one of the reasons why the court at that time did not sign the formal judgment. It was suggested to counsel that they go into that matter. Counsel for plaintiff came back with the same sort of judgment, and say that they are willing to stand on it and argue that they are justified.

Mr. HENEY: Do they put the judgment in exactly the same form?

The COURT: Not exactly the same form, but in effect the same

Mr. MESERVE: On that part, yes, On that part it is, but
325 the whole judgment is not.

Mr. CURLEY: We contend that the statute gives us interest on the judgment.

The COURT: Yes.

Mr. HENY: Of course, I might state that there is no necessity for the entry of any judgment as to the second cause of action; that the coming down of the mandate leaves that judgment standing as entered and as affirmed just the same as any other affirmation of judgment would. Suppose there had not been any first cause of action at all. It would not be necessary to enter a new judgment, and I take it that therefore they are entitled to have their execution on that judgment; that all they need to ask for here is for judgment on the first cause of action. The same thing applies to the receivership. That is our position. We are not going to argue it now. We told your Honor that we would not.

The COURT: Let me ask counsel for plaintiff.

Mr. HENY: —unless you ask us to.

The COURT: The first judgment, the first form of judgment submitted simply provided for the appointment or bond for the receiver as provided for in the judgment as entered by Judge Campbell, simply fixing the bond?

Mr. HENY: Yes, that is all. This judgment simply affirms that. It don't change it. It is practically the same language.
326 Judge Campbell appointed the receiver; that appointment was affirmed and the Supreme Court affirmed that judgment, and this judgment simply recites that and carries that into execution by fixing the bond. That is practically all there is to it.

Mr. MESERVE: And I think that is true with reference to the judgment on the second cause of action. I was looking for it. The judgment as it is now is just the same as it was when we argued it here on the second cause of action. You were here, weren't you?

Mr. HENY: Yes, but I was only concerned with the question as to whether judgment should be entered at all or not. I did not even read that judgment. That was an external injury.

The COURT: Have you any other objections, Mr. Heny, to the form?

Mr. HENY: Not in regard to the second cause of action.

The COURT: Have you any to the first cause of action that you wish to make at this time, something that we can dispose of while we are waiting.

Mr. HENY: Only to make that motion that is coming over here, your Honor, I believe.

Mr. MESERVE: The same things we discussed this morning?

Mr. HENY: And a matter I won't ask to argue at all, because I think I understand your Honor's views on this matter, and
327 we want to get rid of it as quickly as you do in view of that.

The COURT: I want to wind it up definitely as far as I am concerned at this time.

Mr. HENY: I understand the position of the court in view of the resignation which I saw in the paper.

The COURT: It would take a great deal of research on the part of the court going into the case at this time and studying and reading over the record to be able to dictate himself a proper form of judgment.

Mr. HENEY: Yes.

The COURT: And for that reason the court is led to rely largely upon the form of judgment submitted by counsel for the plaintiff. If they include anything in that form of judgment that should not be there when it is brought to the attention of the Supreme Court of the United States, of course, it will be stricken out, or an order made back to this court to correct it. Thereby, they don't make anything. In fact, they lose if they are not careful enough to draw that judgment properly. It is for the benefit of the defendants if the judgment is not in the proper form.

Mr. HENEY: That is true in one respect; yet your Honor, here is one item, on the first cause of action, the Francis and Volkert item, of \$12,700, with interest on that \$12,700 amounting to \$6,000, 328 which would make \$19,000, and an item of \$25,750 garnished in the hands of Steinfeld by S. M. Franklin in a suit for attorney's fees, upon which sum the interest amounts to \$14,000 and several hundred dollars, which is \$40,000 more; and while to some attorneys \$60,000 would be a trifling matter, I confess that the receiving of \$60,000 additional in these stringent times is not considered a trifle by the defendant, Albert Steinfeld; and if that \$60,000 ought not to be paid over by him to the receiver, if he is justly and legally entitled to have a credit for it at this time, and not pay it over, it is a very great hardship. In addition to that, under the ruling of the court there would be 10% attorneys' fees on that, amounting to \$6,000, which might throw some light on the desire of the attorneys for the plaintiff to have that go to the receiver first and then come back again to Mr. Steinfeld. There would be \$6,000 that he would never get back even though he got back the balance of it, as he undoubtedly will, because they admit that he will be entitled to have the balance come back. It is only a question of bookkeeping they say. But this bookkeeping is bound to cost us \$60,000 on that one transfer, and besides that bookkeeping is bound to involve the question of his raising the additional \$60,000 at this time to get it back to himself. It might be that a man is in position to 329 raise every other dollar in the case but could not raise that. It might be that it would bring ruin upon him, destroy his business, throw him into bankruptcy and might do all kinds of things. And we are ready to point out, if the court desires why we believe that \$12,700 item should not be paid, why we believe the garnishment item should not be paid, and we say now that the court expressly found that he was entitled to a credit for it. Not only that, but the contract of May, 1903, upon which they were relying, which rescinded only the custody of the money and which the Supreme Court of the United States says rescinded only the custody of the money, expressly provides that it shall be paid out of that fund and he is entitled to a credit for it before they are entitled to anything at all, because his part that he paid on that contract was con-

ditioned upon his being paid out of that. That is the payment of the Francis and Volkert item. The record shows that it was paid on January 9th, 1904. The charge in the complaint is that Mr. Steinfeld converted money to his own use on January 16th, 1904. The complaint in this action was not filed until January 27th, 1904, consequently the question of what should be done with that \$12,700, whether it should be credited or not, was before the trial court, and the trial court made a finding upon it, and the trial court found it had been paid on this date by Mr. Steinfeld, and that he was entitled to a credit for it.

330 Take the other item of \$25,750. That was an item which was originally \$51,500 in the hands of Mr. Steinfeld garnished by Mr. S. M. Franklin for \$25,000. The trial court found that Mr. Steinfeld gave a bond to the Silver Bell Copper Company for the whole of the \$51,500, notwithstanding the fact that under a garnishment proceeding he could not pay it over if he wanted to without contempt of court. In the face of its being contempt of court he did pay over one-half of it, \$25,750, to the corporation besides giving them this bond for the whole of it. And the decree finds that it was held under this garnishment; that the case was then pending; and that whenever the suit was over with that Mr. Steinfeld should account for what—the whole \$25,000? No, the difference between that and what might be properly paid out by him. Now this judgment as suggested is to the effect that Mr. Steinfeld shall pay to the receiver the whole of that \$25,750 with interest upon it for all this time, amounting to about 60% more, \$14,000 when the record shows what I have just stated, and when counsel know what became of the Franklin suit, and that a judgment was had and money paid out upon it.

Now, we insist that on this record no such entry of judgment ought to be made as to those items. That \$60,000, if it goes into the hands

of the receiver, he will get a commission on it for coming in—
331 it is admitted it will have to come right back to Mr. Steinfeld if justice is done. An attorney's fee will have to be paid upon it,—\$6,000. Why should an attorney's fee be paid upon it? Was it recovered for the Silverbell Copper Company? Why, it was paid out before this suit was brought for the benefit of the Silverbell Copper Company as shown by the findings of the trial court—the \$12,700. Of course, the attorney's fee on that is only \$1,270 and with us leading lights of the bar that is a trifling sum. We need not pay any attention to that.

Mr. Jones suggests that the judgment of July, 1908, was affirmed and that judgment provides for that \$25,750, that Mr. Steinfeld was to account for the balance—not for the \$25,750. And it expressly finds, your Honor, for interest upon the other items of the \$145,000 cash and of the \$100,000 note, and it expressly refrains from finding interest upon this \$25,750, which it expressly finds was held under garnishment, and as your Honor knows, it would have been contempt of court—it was a garnishment out of this same court—it would have been contempt of court to have paid it over. Now there is another item of interest among the items of interest we object to

and that is a question that was never argued or determined by the trial court nor the Supreme Court of the Territory nor the Supreme Court of the United States. I am not going to enter into an argument on it unless your Honor asks me to, but we merely call
332 your Honor's attention to it because it amounts altogether to something like \$150,000 or \$60,000 of dollars that we claim as a matter of law under the statutes of Arizona they have no right to judgment for and no court has ever decided it. Look at Judge Campbell's decision and it has not been decided. How could it have been decided? Judge Campbell's decision was in our favor on the first cause of action, so he could not have held that they were entitled to interest upon that money. He could not have passed upon it. And from the fact that the Supreme Court of the Territory affirms Judge Campbell's decision, it can be readily seen it could not pass upon the question of interest. It was not there to pass upon. The decision was in our favor. Now the Supreme Court of the United States reversed that, but it did not take up the amount of interest and did not have the question of interest before it. There was no possible way to have it before it. No court has ever passed on that question of interest. It is a trifling sum of \$60,000, and here we are going to have a judgment entered against us that calls for \$60,000 we believe as a matter of law we don't have to pay at all, and that no court has ever passed upon.

The COURT: Are you through, Mr. Heney?

Mr. HENY: Yes, so far as that is concerned your Honor. I have not gotten that paper yet.

333 The COURT: Have you anything to say in reply?

Mr. MESERVE: No, I don't see a single one of the points they raise that has not been discussed from beginning to end. The question of interest was a question that was discussed. I understand that the decision of the Supreme Court on the question of interest is that on a certain date in January, 1904, Mr. Steinfeld took money that belonged to the corporation and that he has ever since had it. The statute provides for interest. If somebody takes my money, while it is an equitable action, when it is all done it is an action for money had and received. That is all it is, and it bears legal interest. That is I there is to it.

Mr. HENY: We insist that we can show you as a matter of law, if you want to discuss it.

Mr. MESERVE: I don't want to discuss it. If the court asks me my objections, I understood it has been discussed. We were discussing the question of interest when we met before.

Mr. HENY: Not when I was here. Now the judgment of the trial court—

Mr. MESERVE: What judgment are you reading from?

Mr. HENY: Page—

Mr. MESERVE: This has reference to the second?

The COURT: The first judgment would have no effect here?

334 Mr. HENY: No. Your Honor sees from the statement of Mr. Meserve that the question as to whether they are entitled

to interest or not has not been passed upon by any court unless this court passes upon it. Your Honor sees that clearly?

The COURT: Oh, yes, I see that point.

Mr. HENEY: I don't want to argue the question if your Honor has a conviction in regard to it as to what the law is.

Now in the second judgment it winds up as follows. This is Judge Campbell's judgment in the second trial. "It is further ordered, adjudged and decreed that Albert Steinfeld holds the sum of \$25,750, money of said Silverbell Copper Company, in his hands and as and for security to him against any liability on account of a garnishment levied upon him in the action of Franklin vs. Silverbell Copper Company; said Steinfeld to account to said corporation or to the receiver of said corporation hereafter appointed for said sum immediately upon the final determination and settlement of this action."

Has your Honor any evidence before you that that action has been settled? Has your Honor any date to fix at which the interest shall start to run? Has your Honor any evidence before you as to how much money was actually paid out on that judgment and when it was paid out. Clearly, up to the time it was paid out and

335 that he had something in his hands to turn over and which the law required him to turn over, no interest could run. And here he is asked to turn \$14,000 of interest in addition to the principal sum of \$25,000 over, when it is a known fact that he did pay something out and under it to Mr. Franklin.

Now the fact is that he has paid out all of that \$25,750 and we are ready to prove it. We will put Mr. Steinfeld on and show where every dollar of it went and that every dollar of it went properly, first for attorneys' fees in the Franklin suit; secondly as a judgment to Franklin, and thirdly a compromise judgment to which Louis Zeckendorf consented to the payment of \$5,000 of it over to Mr. Burnett; and fourthly, as attorneys' fees in the Burnett suit: That there has never been any dispute about — at all, and here is Mr. Steinfeld present here and we offer to put him on the stand at present to prove that the entire \$25,750 was paid out on the part of the Silverbell Copper Company by him, with the exception of what was paid to Burnett in the Burnett suit against the Silverbell Copper Company for a commission, and that suit was compromised for the sum of \$5,000 with the consent of Mr. Louis Zeckendorf and the money was paid out.

Mr. Steinfeld, will you take the witness stand and be sworn on that?

336 Mr. MESERVE: Your Honor, we don't understand that any evidence can be offered at this time.

The COURT: Do you object to it?

Mr. MESERVE: Yes, we do.

The COURT: Objection sustained.

Mr. HENEY: We save an exception.

The COURT: I think there are some other matters that you can discuss in the way of motions.

Mr. HENEY: So far as those motions are concerned, those are motions all subsequent to judgment, and as far as we are concerned we have no desire to press them, for the reason that the motion for a

new trial—in fact, all of those motions we would like to argue and to arge fully, but we realize that your Honor is not in a position to hear the argument as we have already announced. Now, they are subsequent to judgment.

Mr. MESERVE: We want all these matters discussed and disposed of, your Honor. I think they ought to be disposed of.

The COURT: Yes.

Mr. MESERVE: That is what the purpose of it was. They were noticed for today.

The COURT: Of course the judgment will be enteres as of the 16th of this month, and this is merely a formal matter. So the motion to set aside judgment would be directed to the judgment as rendered on the 16th.

337 Mr. HENEY: Well, I will say to your Honor that as far as the law of the State of Arizona is concerned on that I have not an opinion. I don't know.

Mr. MESERVE: That is what it recites in their motion anyhow.

Mr. HENEY: It would not under the California practice, because under the California practice there is no judgment until the findings of fact are signed. The signing of findings of fact in this particular case, there being no evidence, no findings and no anything else that I know anything about, I will confess I am up in the air.

The COURT: Our Supreme Court has held that the motion for a new trial must be filed within ten days from the time of the entry of judgment, and at the time the entry is made upon the minute entries of the Clerk.

Mr. HENEY: Yes, so I understand.

The COURT: And therefore, this would have the same effect. We will take up the first motion, motion to set aside judgment. Do you desire to say anything on that?

Mr. HENEY: Well, we would like to argue those motions fully.

The COURT: You can argue them briefly. I will give you until 5:30 to get out of here.

Mr. HENEY: They would involve merely an argument of
338 these things that I have been talking about to your Honor.

The COURT: The same thing?

Mr. HENEY: I think your Honor has your mind made up on that.

The COURT: Then, Mr. Clerk, relative to the motion to set aside judgment, case No. 3496, Zeckendorf vs. Steinfeld, et al.,—

Mr. HENEY: Pardon me for interrupting your Honor, but before doing that I want to ask in addition to the motion already filed an additional motion which may be considered as made and filed prior to the entry of judgment on the 16th. It is in line with those that were filed originally, but it is to the effect that upon the first trial of this case the District Court of the Territory of Arizona—you are following the finding of fact, that is finding 8, and I quote it. That is the one that the contract of May 20, 1903, established the right of the money in the Silverbell Copper Company, and secondly that it made finding No. 10 in which it found the intent of the parties at the stockholders' meeting and then I proceed to say: "that said defendant Albert Steinfeld filed a motion for a new trial upon

the ground, among others, first, that the evidence does not sustain the judgment, and second, that the judgment is contrary to law, and third, that the court failed to find upon certain material issues raised by the pleadings, and failed to find certain material facts.

339 That said District court denied the motion of Steinfeld for a new trial upon each of said grounds."

And the record so shows. There is no question about that.

"That an appeal was taken by said Steinfeld from said judgment of said District Court * * * to that part of said finding and the whole thereof, which reads as follows, to-wit:"

Then I quote that part of the finding. Now an assignment of errors was made in the brief at that time, as your Honor knows, and we have a copy of the brief that shows that this assignment was made. There is no question about that.

"That upon said appeal the Supreme Court of the Territory did not pass upon said assignment of error * * * as stated by said Supreme Court of the Territory in its decision, that"—

Then I quote from the decision, "Assuming the fact to be sustained by the evidence that the parties to the agreement of May 20, 1903, in rescinding it did not intend thereby to effect all the provisions thereof, but only a part thereof a question of law is thus presented."

Assuming that fact without deciding it as supported by the evidence, then they proceeded to dispose of it as a question of law by saying it is wholly immaterial. Then the Supreme Court proceeds to discuss and lay down its opinion on this question, and then

340 goes on and says:

"It seems clear from the findings of the court * * * must be regarded as rescinded as a whole."

And I go on and quote at length from the opinion down to where it says:

"Again the agreement, relating as we have seen to the distribution of the proceeds which had not at the time of its execution been made, was executory in its nature and remained such when this suit was brought. * * * all rights created by the agreement were abrogated by the parties."

Now, we go on to say, "The Supreme Court of the Territory reversed the judgment of the trial court * * * produced at the first trial."

Mr. MESERVE: Mr. Heney, you have asked us that we consent to that being considered——

Mr. HENNEY: No, I asked the court.

Mr. MESERVE: We enter an objection to its being filed at all or considered by the court, and we particularly object to its being considered at any time except just when it is presented.

Mr. HENNEY: Well, we had better finish it first.

Mr. MESERVE: Excuse me.

Mr. HENNEY: "That upon the second trial of this action * * * introduced by stipulation at the second trial of this case."

341 And the facts here are sworn to by Mr. Steinfeld in the usual form.

Now, the point of the objections and exception to the entry of judgment being merely this: that the opinion of the Supreme Court of the Territory became the law of the case, as far as the trial court was concerned for the further trial of the action, and that under that the trial court was precluded from making a finding upon the question of the intent of the parties at the stockholders' meeting, and that that was, as it turns out now, not only a material issue in the case but the paramount material issue in the case in accordance with the view of the Supreme Court of the United States; that no finding was made by the Trial Court upon that because the law of the case precluded it.

The COURT: That is, you mean the presumed law of the case.

Mr. HENEY: The law of the case. It is the law of the case. The Territorial Supreme Court's decision is binding upon the trial court in an action as the law of the case until and unless it is subsequently set aside by the Supreme Court of the United States. As long as that decision of the Supreme Court of the Territory remains in full force and effect the trial court is bound by it. It does not bind the Supreme Court of the United States at all.

The COURT: Will you permit the court to ask you one 342 question there?

Mr. HENEY: Yes.

The COURT: While it may be binding upon the trial court, is it binding upon the attorneys representing the party? Ought not they at that trial have made an offer of that evidence and the trial court could have then excluded it, and it would be in the record in the shape of an offer?

Mr. HENEY: Why, the evidence is in there. It was all stipulated in there, the same evidence that was in before, and the only thing that the attorneys could do about it was to ask the court to make a finding of fact upon that issue. Now, the court would have to decline to make a finding of fact upon that issue.

The COURT: Did he ever do that?

Mr. HENEY: No, the attorneys did not do that because a finding of fact upon that issue was just as essential to the plaintiff as it was to the defendant; if there was not a finding of fact upon that issue the plaintiff could not recover.

Mr. MESERVE: Mr. Heney, do you contend that the first decision of the Supreme Court of the Territory of Arizona precluded Judge Campbell from making any finding of fact on that?

Mr. HENEY: I certainly do. It would have been contempt of court.

Mr. MESERVE: Well, I don't think so.

343 The COURT: One at a time, gentlemen.

Mr. HENEY: He has asked me the question. It would have been contempt of court for Judge Campbell to fly in the face of the decision of the Supreme Court of the Territory in the particular case at bar which he was trying.

The COURT: Making a finding of fact?

Mr. HENEY: Yes sir. When they lay down the law and say that that is an immaterial issue in the case; it is a question of law only

and this court has no business with it and this court says the fact is so and so as shown by this evidence, then that trial court has no business touching it. And the case was sent back to the trial court to find one issue only and that was the question of trusteeship and on that the gentlemen on the other side abandoned it.

Now the trial court did not find any issue. What it did was to pass the buck by putting a part of the evidence only in a finding of fact and calling it a finding. Now I am not going to argue that because I am perfectly satisfied as to what is going to happen to that when we get back to the Supreme Court of the United States. I am satisfied we can show the Supreme Court of the United States that we were precluded when we had that subject up, and also when we had assigned the insufficiency of the evidence to support this finding which was made as to the intent of the parties and the Supreme Court of the Territory refused to pass upon it, because 344 they said that it was a question of law only; that this court had nothing to do with that.

Now, every court in the land has held that a litigant is not bound to go and do idle, useless things, and that he has not to fly in the face of a decision that is in his own favor.

Mr. MESERVE: And if it goes back to the Appellate Court that he has got to take the consequences.

Mr. HENEY: There are no decisions to that effect. It would not be justice. It don't hold a man liable and punish him. Mr. Steinfeld is not to be criminally punished in this case. Why the Statutes of the United States, your Honor, provide that fraud against the Government of the United States is punishable not to exceed two years' imprisonment and by \$10,000, fine. What is being done in this case? The attorneys' fees is a find upon Mr. Steinfeld. Your Honor knows in an equitable suit by Zeckendorf to recover from Steinfeld he would have to pay his own attorneys' fees. Now then Mr. Steinfeld is called upon to pay the attorneys' fees for Mr. Zeckendorf. Why? Upon the ground that he was guilty of fraud? No. No judge has ever had the temerity to say so in the face of this evidence. No judge has ever said so. No the contrary the only trial court who ever considered all the evidence said exactly the contrary in a former finding, and it is not a new finding again 345 because the Supreme Court of the Territory has said the intent of the parties is immaterial, is an immaterial issue, and so he refused to make that finding again on the second trial on exactly the same evidence. But Mr. Steinfeld is to be fined \$40,000 attorneys' fees. Why, Mr. Steinfeld, if you entered into a conspiracy to defraud the government of the United States, \$10,000 fine is the most that they could stick on you. Has Mr. Steinfeld committed any crime? Has Mr. Steinfeld committed any fraud? Nobody says so. A mistake, a mutual mistake, and it is only on the ground of a mutual mistake that the parties ever can recover in this case, because that is all they have alleged in their complaint. That is all that the Supreme Court of the United States can say, and if they recover on the ground of mistake, why, Mr. Steinfeld, for following the advice of your attorneys you are going to be punished to the extent of

\$160,000 or \$170,000 of interest and this finding of \$40,000 attorneys' fees. And the next day under this judgment, or ten minutes afterwards, after you pay this judgment if the receiver does his duty in the case he will hand you back $2\frac{2}{3}$ '3 of all the money that you turn over to him after having deducted the \$40,000 for the attorneys' fees by way of fine upon you.

Mr. MESERVE: Forty-two.

Mr. HENEY: \$42,000. Excuse me. We will add another 346 thousand. We will be generous, as a matter of fact, when we give you of that money, Mr. Steinfeld, which you paid over was originally a gift from you to the corporation under the original finding of fact in this case. You had gone and bought these mines with your own money and you had said, "I will not take much, for I will let Mr. Zeckendorf and Mr. Curtis have a share of it." And Mr. Zeckendorf has already gotten, your Honor, what? What did he put into this venture? Why the firm of L. Zeckendorf & Company gave credit to a mining company. What was it? They sold merchandise and powder and stuff to work a mine with, and before the partners became owners of the biggest part of the stock, two-thirds of it, and the amount that they sold them in merchandise was \$74,000, and they charged them 12% interest upon the merchandise at the end of each sixty days' period of time, and they got back into the hands of L. Zeckendorf & Company—this is a motion for an arrest of judgment that his Honor is willing to listen to until 5:30 p.m. they got back as interest upon the merchandise itself on that \$74,000, they got back some \$50,000 making \$124,000 that they got out of these mines. And what else did they get? What did the mines cost them? Why, \$25,000 that they paid William Zeckendorf. Did they get it back? They got it back with 12% interest upon this and then Mr. Zeckendorf got 55% of all that profit, of that interest, not to mention the profit upon the merchandise. 347 which I would be afraid to mention in the presence of Mr. Steinfeld and your Honor—they got back that profit, and Mr. Zeckendorf got 55% of it on this risk. And then what? Then a dividend was declared and when that dividend was declared Mr. Zeckendorf had a suit pending—or brought a suit in which he asked that Mr. Steinfeld pay back the \$27,690 that he got as a dividend—that he pay that back with interest. Although Mr. Zeckendorf was clamoring for dividends at the time himself, until he started suing and then Mr. Zeckendorf refused to take his \$27,750 of dividend until after awhile I suppose his attorneys need a little money, and he says, "All right, I will take it." And he took the \$27,750 as a dividend, as a profit upon those mining claims out there all earned by the industry and intelligence and the sole work of Mr. Albert Steinfeld. We are talking about equity in this case. And with that \$27,750 dividends, all of the profits and moneys and the interest that he got on the other, then what? Why, Mr. Steinfeld also says, "Here is \$250,000. I bought these mines and took all the chance upon them. It would have been my loss if there had been nothing come out of them. They are worth more than the old mines turned over, but here goes, boys. Take it. We will put it in the pot." A

then Mr. Zeckendorf says, "No, sir, you shall not have any security." Although the Neilson case is pending for the 300
348 shares of stock. And then this quarrel starts, and now what?
As a punishment for coming in and deliberately rescinding, exactly what Mr. Steinfeld had a suit to rescind in San Francisco, where he alleged that he had never seen the contract of May the 9th, 1903, but nevertheless that he rescinded it; with that contract served upon him he walked before the stockholders' meeting with a list, and with counsel present to assist him he goes to this stockholders' meeting and votes to rescind it. Why, because he thought he could take some of that \$18,000 on the theory that Mr. Steinfeld took his son to Europe with him when he bought the mines from Francis and Volkert and included his expenses, and on the theory that he was acting as trustee and he could hold him anyway. He was getting all of the benefits of it while Steinfeld held the sack on the lawsuits which might me brought. And now this money, all of which is a gift from Mr. Steinfeld,—Steinfeld owns $2/3$'s of it, $3/4$'s of it practically as against Zeckendorf. Certainly $2/3$'s of it.

Mr. MESERVE: As a stockholder.

Mr. HENEY: What?

Mr. MESERVE: As a stockholder.

Mr. HENEY: Yes, yes, and he is in this case simply as a fiduciary proposition.

Mr. MESERVE: May I interrupt you a minute?

349 Mr. HENEY: In just a minute. And courts of equity look at the substance and not the shadow. Your Honor is sitting here as a court of conscience, a court of conscience.

Mr. MESERVE: Mr. Henev, I want to catch the 4:25 train. I understnad your Honor adjourned court until 2:00 o'clock from this morning. I have heard this speech six times.

Mr. HENEY: No, you haven't.

Mr. MESERVE: Yes.

Mr. HENEY: Well, it will do you good to hear it again.

Mr. MESERYE: I don't want to hear it again.

The COURT: I think the understanding was that there was to be no argument.

Mr. MESERVE: I am perfectly willing to get to some understanding and fix up this record.

Mr. HENEY: Now, your Honor, I will stop making any argument, but I have made the point of this money coming from the English group of mines—all of it. That there is not any question about.

There is a question as to whether Mr. Steinfeld did not originally own the English group of mines, and that has never been determined, because the court has held that this money goes to the Silverbell Copper Company under the contract of May 3rd, 1902, which he entered into with his eyes open.

350 Now, if he has followed the advice of his attorneys he should not be punished to this extent. Is your Honor going to say that he has to pay some \$160,000 of interest that no court has ever passed upon? We have filed affidavits to show that

Mr. Steinfeld owns every share of stock except the 250 that Mr. Zeckendorf owns.

None of those records are before your Honor. You can talk about the Silverbell Copper Company. There is no such thing interested in this case. There is nobody interested but Mr. Steinfeld and his uncle, Louis Zeckendorf. Oh, yes, I forgot, there are some attorneys. They are interested in getting a 10% proposition and the more money that goes into the hands of the receiver the more money they get 10% from.

Mr. MESERVE: That is a natural habit of attorneys, isn't it?

Mr. HENEY: I know it is. But I think after a man reaches a mature age, and the heat of youth becomes tempered that he naturally ought to use a little wisdom and a little discretion. Yes, I think so. I think for them to claim that the whole of this should go into the hands of the receiver is something that I would have to describe by words before this court, because I don't want to be offensive to attorneys.

Mr. MESERVE: Mr. HeneY, I suggest that you do it right now.

Mr. HENEY: And I don't mean it in any offensive sense
351 either, because it is a difference of viewpoints merely. I don't mean that Mr. Meserve would be guilty of anything that he himself considered to be wrong. I want to say that I if I were sitting as a chancellor would look upon it as an iniquitous proceeding, and I would look upon it as an outrage to justice; I would look upon it as prostituting justice; I would look upon it as putting justice in the gutter.

Analyze it. Does a court impose a penalty of interest where the statute does not give it, except by way of punishment for a wrong on the part of a trustee? Not so far as I know where there is a mistake; there are few courts that do hold that it can be for mistake but the great weight of the authority is the other way.

The COURT: The Supreme Court of the United States decided that point in this case.

Mr. HENEY: Never passed upon it.

The COURT: On the second cause of action the court allows 10% attorneys' fees.

Mr. HENEY: The statute allows it on the second cause of action. That is one of the things that the statute allows.

The COURT: Then you are not directing all your remarks to the second cause of action? It is on the first cause of action?

Mr. HENEY: Yes, your Honor. And that question never was before it because we did not discuss it upon the other. Now
352 is a punishment, and an attorney's fee is a punishment, and an attorney's fees being a punishment the question is up to your Honor, if your Honor feels that you are precluded by the approval of 10% that is in the finding, the proposition is up to your Honor on what is it to be? Is it to be on the \$12,700 and the \$25,750, all of which were paid out for this corporation in May 1903, and interest upon them making some \$60,000?

Mr. MESERVE: Now with reference to considering this motion

being filed before June 16th, I enter an objection to that and I enter an objection to its being filed at this time.

The COURT: I will state now that the objection to its being filed as of June 16th will be sustained. It may, however, be filed and considered by the court as being filed at this time.

Mr. HENEY: We will offer it as an amendment to the objections originally filed.

The COURT: Yes, it may be filed.

Mr. JONES: And your Honor considers it.

The COURT: Yes, and considered by the court.

Mr. HENEY: Now, I will ask your Honor in ruling upon these objections, if you can make one ruling that applies to all of them, that the objections are all considered and overruled?

The COURT: Well, I think it would be probably better,
353 more satisfactory to counsel on both sides with reference to those motions that an individual order be made.

Mr. HENEY: No, we can dispose of the objections that way.

The COURT: A blanket order may be entered then overruling them all.

Mr. HENEY: Now, in overruling this objection which I have just been reading to your Honor and which has been filed as an amendment to the objections heretofore filed——

The COURT: Pardon me just a minute. Is this the lost paper?

Mr. HENEY: Yes.

The COURT: The one you were waiting for to be filed?

Mr. HENEY: No.

Mr. MESERVE: That other has reference to the receivership as I understand it, hasn't it, Mr. Heney?

Mr. HENEY: No, the other is not in reference to the receiver. We are not going to call up the motion in regard to the receiver at all.

Mr. MESERVE: Going to abandon that?

Mr. HENEY: Well, for the present. No, we are not going to abandon it, but for the present we will not call it up.

Mr. MESERVE: We want it disposed of.

354 Mr. HENEY: We are not prepared to go ahead with it. We are not prepared to make a showing at this time upon that motion.

The COURT: Well, we will dispose of this one you have in your hand first, and take the others up afterwards.

Mr. HENEY: This is the one just shown to have been filed. This is an objection to the entry of judgment. We would like to ask your Honor if you will pass on that specifically by overruling the objection. Would your Honor have any objection to stating the grounds upon which it is overruled?

The COURT: This I take it is the matter discussed in chambers this morning?

Mr. KINGAN: That is what it is intended for.

Mr. HENEY: Yes, your Honor, the same offer.

The COURT: You are offering this objection as an objection to the entry of judgment at this time, and as an exception, rather, to

the court's ruling in overruling this motion for a new trial? suppose that is what that consists of?

Mr. HENEY: No, your Honor. This is not exactly what we were talking about in chambers, but I wanted to make the same point on it. This is an objection to the rendition of judgment. You say as an amendment to the objections to the rendition of judgment.

In passing upon that if your Honor hasn't any objection
355 stating the ground.

The COURT: If I catch the point I would be glad to answer.

Mr. HENEY: I wanted to make the point which we talked about in chambers.

Mr. MESERVE: In other words, you want Judge Sutter to state his reasons for entering judgment.

Mr. JONES: Yes.

Mr. HENEY: His reasons for overruling this objection. That is to say, the point I want to get at is this: as to whether your Honor overruled this objection in the exercise of a judicial discretion as to whether or not you are going into this based upon an examination of the evidence in the case, or whether your Honor overruled it upon the ground that you consider that the judgment of the Supreme Court of the United States is final and in effect directs the entry of a judgment.

The COURT: That is it exactly.

Mr. HENEY: The latter.

The COURT: The latter, with this exception. The only discretion that the court has in this matter, of course, in view of the judgment and mandate coming down from the Supreme Court of the United States—the only discretion that the court has is as to the things which cannot be settled at this time, such as the appointment of the receiver, fixing the bond and an accounting, and
356 of course, the court has discretion in leaving those matters open to be settled hereafter. But as to entering judgment under the mandate of the Supreme Court of the United States, I don't see any other thing for this court to do except render judgment on that mandate, which the court has done.

Mr. HENEY: In favor of Zeckendorf.

The COURT: In favor of Zeckendorf and against the defendants Steinfeld, and the other defendants. And judgment has been entered and your objection overruled for that reason.

Mr. MESERVE: Now, on this question of the objection to the receiver, I would like to have counsel pass upon that on the ground that they are not proper—

The COURT: Let me look at that, Mr. Meserve.

Mr. HENEY: One moment, your Honor. There might be room for a little misunderstanding there at the end where you said the judgment. Read that. If your Honor will change that around and make it read, "and for that reason your objections are overruled and the judgment shall be entered," which, I take it, is what your Honor intended.

The COURT: It may be so worded.

Mr. HENRY: Now, there is just one other little thing. An offer was made at the other session on June 16th of 1913,—an offer was made by Mr. Pattee to put witnesses upon the stand in regard to the attorneys' fees opposing the 10%. He wanted to prove what the value of the services were and your Honor denied it. Now your Honor had in the course of the talk—your Honor had ordered judgment just ahead of Mr. Pattee's offer. Now I take it that the court treated the offer as having been made before the judgment was rendered, did you not?

The COURT: Yes.

Mr. HENRY: It may be so deemed?

The COURT: The offer was considered by the court and the offer denied—overruled.

Mr. HENRY: Now, here was one which I prepared on the question that we talked about in chambers. Well, your Honor can look at it because you can probably grasp it better than by my reading it. I have not read it myself since it was typewritten.

Mr. MESERVE: What is that about?

Mr. HENRY: That is about—oh, that same point that I think we have made just now.

The COURT: I think that is covered by the record already on this point.

Mr. HENRY: I am inclined to think it was, your Honor.

The COURT: Yes, yes, that was covered.

Mr. HENRY: Now, we would like to call your Honor's attention then to one other thing. There is an affidavit on file here in connection with one of these motions. It is the motion in regard to the discharge of the receiver, the amended motion. There is an affidavit on file by Albert Steinfeld to the effect that Mary Neilson has brought suit in this court to establish the ownership to 300 of the 1,000 of stock in her name, and a judgment was rendered by the trial court in her favor for those 300 shares of stock, and this \$34,000—it amounts to in round numbers—that is to be paid to the receiver on the second cause of action, are the dividends which were paid to Mr. Steinfeld on those 300 shares of stock. Now this suit of Mary Neilson which is pending is against Albert Steinfeld and the Silverbell Copper Company, and it has been defended, as is shown by this affidavit on file, by Albert Steinfeld individually, and also on behalf of the Silverbell Copper Company, by him and under his direction, Mr. Ives acting as his attorney. The Supreme Court of the Territory the affidavit shows reversed the trial court, but the Supreme Court of the United States reversed the Supreme Court of the Territory, and the Supreme Court of the Territory had made no findings of fact, and the Supreme Court of the Territory thereupon upon the reversal coming down did make findings of fact. But a motion was made to set them aside, or for a re-hearing on that question, and that is pending. Now, if Mary Neilson recovers as shown by this affidavit, if she recovers in that cause of action she is to be entitled to the whole of the \$34,000 involved in the second cause of action. Now, it goes into the hands of the receiver. We think that

this court ought to make an order that that receiver hold the whole of that \$34,000 pending the determination of the Neilson case. Mr. Steinfeld stands subject to a second judgment by the Neilsons, or Mary Neilson, upon this particular money, this dividend.

The COURT: Well, I will state now, Mr. Heney, and stop any further remarks on that, that this court would prefer not to make any such order as he will not be on the bench more than a week longer, and the court, whether it is my successor or some other judge, that will have supervision over that receiver I should prefer make that order. Now I take it for granted that Mr. Steinfeld immediately at 3:00 o'clock this afternoon or at 3:30 won't pay over this judgment to the plaintiffs. It will probably be some days—I mean, as to the receiver, it will be some days before the money is actually in his hands, and there will be ample time for some other judge to make that order disposing of that. Is that satisfactory to you?

Mr. MESERVE: Why, I want to say that as far as this court is now concerned in entering judgment, it cannot be concerned with any other case. When any money goes into the hands of the receiver, and until it does go into the hands of the receiver neither
360 the receiver nor the court has any jurisdiction over that money. Now when the money gets in the hands of the receiver it will be time enough. Then the receiver has got to hold that money until the court orders it paid out, and I take it for granted, knowing a little of the attorney for the receiver, that he is not going to permit that receiver to pay out any money until the court has signed an order. This court will have no jurisdiction over that money until the money is in the hands of the receiver.

Mr. HENY: The judgment attempts to direct in advance what the receiver shall do as to some things, and among other things, it does direct the receiver to make certain payments, and one thing it directs the receiver to do is to pay the sum of \$26,000 to these attorneys, Mr. Hereford and Mr. Meserve. Now we have no way of stopping that from being done, no way on earth. Now, as far as the receiver is concerned he is to be advised by his own attorney, and his own attorney is Mr. S. M. Franklin, and Mr. Steinfeld does not feel that he is in a position to discuss any questions with Mr. Franklin in regard to it, or any of these matters, and this court in ordering it turned over—why, I am satisfied if your Honor had more than the short time you have I would be insistent upon it.

Mr. MESERVE: Mr. Heney, may I ask you a question here?

361 Mr. HENY: Yes.

Mr. MESERVE: Did not Judge Campbell order that amount of money to be paid out of this fund and the Supreme Court of the Territory affirm it and did not the Supreme Court of the United States affirm that and has any other court the right to stop that now?

Mr. HENY: Yes, it has.

Mr. MESERVE: Who?

Mr. HENY: This court has, because based on something that has nothing to do with that.

The COURT: This court won't make any orders relative to that receiver or what he is to do or what he is not to do. I will leave that entirely to my successor.

Mr. HENEY: This court will appreciate the fact that all I can do is to present the case for my client.

The COURT: Yes, that is all you can do.

Mr. HENEY: And I shall meet the court in the same spirit in which the court meets me in regard to the matter.

The COURT: Let us dispose of these motions. Motion to modify judgment. You may enter an order, Mr. Clerk, denying that motion. Motion to set aside judgment, you may enter an order, Mr. Clerk, denying that motion.

Mr. HENEY: We except to each of these.

The COURT: Motion in arrest of judgment, enter an order,
362 Mr. Clerk, denying that motion.

Mr. HENEY: We except.

The COURT: And you can let the record show, I suppose—at this time,—Mr. Heney, the record, may show at this time that all parties being present in court and the motion for a new trial in this case having been presented, and argued and the court, being fully advised in the premises, denies the same?

Mr. HENEY: Yes.

The COURT: Let the record show that, Mr. Clerk.

The COURT: Is there any other motion?

Mr. MESERVE: There was a motion with reference to the question of the discharge of the receiver, and that is a motion, I suppose, they can take up at any time, if they want to withdraw that now. But we want the present record clear.

The COURT: Where is that motion?

Mr. MESERVE: I have a copy of it, which was presented to me by Mr. Curley and which was served upon him Saturday. I understand they don't intend to press it. Have you filed it?

Mr. JONES: Yes, it was filed.

Mr. HENEY: It was filed, but a motion is never presented your Honor, until counsel has presented it in open court.

The COURT: I did not know but what the defendant noticed it for today.

363 Mr. HENEY: We did notice it for today, but we are not introducing it now.

The COURT: That motion has been denied. You can let the record show, Mr. Clerk, that the motion to modify the judgment and discharge the receiver has been denied. That was partially denied in the previous order.

Mr. MESERVE: Will your Honor sign the form of judgment that is here?

The COURT: Present the court with a pen. Are there any further orders that the attorneys desire to make?

Mr. HENEY: Yes, if your Honor please, we would like to ask that the court make an order staying the judgment, that this money all be paid to the receiver for a period of 60 days. Now I mean as to

the first cause of action. As far as the first cause of action is concerned: I am not asking it in regard to the second cause of action.

Mr. MESERVE: We shall object to that, Mr. Heney.

Mr. HENEY: The reason for our asking this is that as your Honor knows, this is midsummer. We intend to take an appeal, and we think we are entitled to it, as your Honor has indicated to counsel on the other side, there might be a question about part of this anyhow. Now we intend to, in good faith to take an appeal on the judgment as
364 to the first cause of action, but we are not now giving any notice of appeal, and for this reason: that within 20 days after the notice of appeal we would have to file a bond, and it is impossible to do it in 20 days from this time, so that we cannot do that. I am merely telling your Honor that we do intend in good faith to make this motion just as soon as it is safe for us to make it in view of the difficulty in getting the bond ready. This is going to be a very large bond. The way in which that judgment has been entered the bond will run something over \$4,000, \$407 or more and to get sureties in double that amount means a very large sum of money, which would be a million, six hundred thousand, and over.

Mr. MESERVE: No, four thirty four.

Mr. HENEY: Four forty, practically and eight eighty, two sureties would be a million, six hundred thousand dollars. Now, it is the middle of summer, and I have a list here of bondsmen and men we expect to get, and the most of these have been talked to, have they not, Mr. Steinfeld?

Mr. STEINFELD: Quite a number.

Mr. HENEY: The largest ones have?

Mr. STEINFELD: Yes.

Mr. HENEY: And have agreed to go on, Mr. Epes Randolph, \$200,000; Leo Goldschmidt, \$200,000, Louis Iager, \$200,000,—Mr. Iager is up in Los Angeles or somewhere in California, M. P. Freeman, \$100,000, B. M. Jacobs, \$100,000—Mr. Jacobs has
365 got to go on and Mr. Jacobs is in New York. And here is a complete list which we are perfectly willing to turn over to these gentlemen. They know practically all of these people, and the total here amounts to two million, one hundred and fifty thousand. Now in the first place, we would have to get this bond up, and if there is any exception or objection to the sureties, filed or justification asked for, they would all have to justify enough to bring the total amount—would have to justify within five days after the demand was made. You can see that these people scattered as they are at present—how impossible it might be to carry that out. Now for that reason we think that your Honor ought to give us sixty days' stay on the order to pay over to the receiver on the first cause of action only. We will pay the other right away, expect to pay it immediately on the second cause of action.

Mr. MESERVE: Now, if your Honor please, the theory on which this judgment has been entered is that this is the final act in this long drama. The theory on which your Honor has signed this decree today is that you simply entered the decree of the Supreme Court of the United States—not that you have entered the decree of this court

or the decree of the Supreme Court of this Territory, but that you today have entered the decree of the Supreme Court of the United States, and for your Honor to make any order after signing that decree would be to write a doubt and to state that you have not entered the decree of the Supreme Court of the United States, but have entered the decree of the Superior Court of this county. Now, this judgment was reversed by the Supreme Court in June, 1912, and the re-hearing was denied, in October, 1912. This is the first day of July, 1913, and counsel have had in mind as the record from the Supreme Court of the Territory to this court, to this day will show, the move on their part to attempt to convince the court of appeal that your Honor's action was not the mere entry of the decree of the Supreme Court of the United States. Now, if your Honor entered the decree of the Supreme Court of the United States when you signed that order, your Honor has no more jurisdiction to stay that than have I.

Mr. HENEY: Does he not have jurisdiction to stay the execution?

Mr. MESERVE: Absolutely not, because the mandate of the Supreme Court carries with it the obligation upon this court to collect that judgment. The Supreme Court of the United States has told the Supreme Court of the State of Arizona and through the Supreme Court of the State of Arizona has told this court to enter its decree, and that this court has done, and it has entered the decree of the Supreme Court of the United States. It has not entered this court's decree, and it has no right to stay it, and we will object to any stay of execution.

The COURT: I will state this, Mr. Meserve, if the court should grant a stay of execution for any time it would not be in consideration of any appeal that might be taken, or any right to appeal. It would be simply that the court realizes that \$420,000 or \$430,000 is rather a large sum of money.

Mr. MESERVE: Yes, but they have had since June, 1912——

The COURT: But you realize, possibly, as a lawyer that a litigant always fights with the hope of winning, and is not always prepared as soon as he loses, and a man may be very wealthy, may be worth three or four millions in property, but to raise \$432,000 over night becomes very embarrassing at times, and this judgment as entered——

Mr. MESERVE: They haven't asked for that for that purpose; they have asked it preparatory to taking an appeal.

The COURT: I say the court ignores that part of the proposition, and would only grant a stay for any length of time which the court might see fit on the ground stated by the court.

Mr. HENEY: Of course, your Honor, in getting up the bond, while we are getting it up we are going to provide for the alternative, as a matter of course, and I am frank to say we do need the time to get the money.

The COURT: You would not expect this money to be paid in immediately to the receiver?

Mr. MESERVE: If your Honor please, as to whether or not execution will be issued is another question. Now, while the control of

this is absolutely in the hands of Mr. Zeckendorf until the judgment has been accomplished, in other words, he as a minority stockholder, having sued on behalf of the corporation, and having recovered, the control of this action and of the judgment itself is absolutely in his hands and not in the corporation's hands until the judgment itself has been carried into effect, the amended judgment has been carried into effect. He ceases then to be an actor. The obligation on his part is to move on behalf of the corporation and to recover that money. Now we have here a large judgment and while I would not expect Mr. Steinfeld or anybody else to be prepared to pay this large sum of money on a moment's notice, yet when the Supreme Court of the United States denied Mr. Steinfeld's petition for a re-hearing, then and there at least was notice to Mr. Steinfeld that in the course of a short time he must be prepared to pay that money. Now that was in the 1st of October, the first week in October, 1912, nine months or more ago, that the petition for a re-hearing was denied. The decision reversing the territorial Supreme Court's decision was in June. Now as to whether or not Mr. Zeckendorf will issue the execution is another question, and in those matters counsel was going to be guided by the expressions of Mr. Zeckendorf, but I don't think, your Honor has jurisdiction to stay this execution.

Mr. HENEY: Why, You say it is the Silverbell Copper Company; why Mr. Steinfeld owns 2/3's of the stock.

The COURT: Well, to end this discussion the court will have entered an order here staying the execution for the period of forty days. Split the difference with you. You will be able to get your bondsmen by that time.

Mr. MESERVE: That is, as to the first cause of action?

The COURT: As to the first cause of action.

Mr. MESERVE: And of course, it is understood that we enter an exception to that order.

The COURT: Now, there is a part of the minutes here, Mr. Meserve and Mr. Heney, in the minutes as recorded the court may have inadvertently made a remark that possibly does not mean anything, but I would like to keep the record straight, and that is as to judgment against Steinfeld and the other defendant. I think the other defendants—

Mr. MESERVE: Oh, yes, judgment against the other defendants.

370 The COURT: That is what I want to find out, whether that should be in the record there or not.

Mr. MESERVE: I was going to call Mr. Heney's attention to the fact and the court's attention to the fact that he is naming three large bond givers there against whom judgment has already been rendered.

Mr. HENEY: As far as those bondsmen are concerned, we had that in mind. Those bondsmen will have been discharged by reason of the fact that the other will have been paid before.

The COURT: The reason I am calling it up, I want to—

Mr. MESERVE: Your Honor is right. There were other defend-

ants, Mr. Shelton and Mr. Curtis, the Silverbell and the Mam-oth Copper Company, and it is on the bonds. There is judgment on the three bonds.

The COURT: Anything further in this case on the part of the counsel on either side?

Mr. MESERVE: I think not.

Mr. HENEY: I think not.

371

Certificate.

I, H. C. Nixon, hereby certify that the foregoing fifty-one pages contain a true and correct transcript and statement of the oral proceedings had in the matter above entitled, on Monday, June 16th, Tuesday, June 17th and Tuesday, July 1st, 1913, in said court.

Dated at Tucson, Arizona, this 14th day of July, 1913.

H. C. NIXON,

Official Court Reporter.

It is hereby certified that the foregoing is a true and correct report and transcript of the record of the proceedings in the above entitled action before this Court on June 16th, 17th and July 1st, respectively, 1913, and is sufficient to form a basis for a review of the rulings, orders and actions of the Court set forth therein, and made and rendered on said June 16th, 17th and July 1st, 1913, and the said report and transcript is hereby approved as such.

FRED SUTTER,

Judge of the Superior Court of the State of Arizona.

(Filed by Defendants July 14, 1913.)

(Re-filed Aug. 12", 1913.)

372

(Title of Court and Cause.)

Affidavit.

STATE OF ARIZONA,

County of Pima, ss:

Albert Steinfeld being first duly sworn, deposes and says: that he is one of the defendants in the above entitled cause; that heretofore, and on the first day of March, 1913, he filed an affidavit in the above entitled cause, in which he stated that he believed that the Judge of the above entitled Court, namely, Hon. William F. Cooper, was biased and prejudiced against this affiant and the other defendants in the above entitled cause, and for that reason prayed a change of venue; that affiant now believes that he was mistaken in the facts which were the basis for the affidavit of bias and prejudice, aforesaid, and now believes that the Judge of said Court aforesaid was not and is not now biased or prejudiced against him or any of said defendants; that affiant as such defendant withdraws the aforesaid affidavit insofar as the same may be withdrawn, and prays that it be considered for naught, and says that he believes said

Judge of said Court is not in anywise biased or prejudiced against him or any of the above named defendants.

ALBERT STEINFELD.

373 Subscribed and sworn to before me this 29 day of July,
A. D., 1913.

My commission expires Jan. 8, 1917.

[SEAL.]

C. M. HUGHSTON,
Notary Public.

(Filed August 7th, 1913.)

Minute Entries.

Be it remembered, that heretofore and upon the 1st day of March, 1913, the same being one of the regular juridical days of said court, the following order was had and entered of record in said Court in said cause, which said order is in words and figures as follows, to-wit:

(Title of Cause.)

Now comes the defendant herein, Albert Steinfeld, by his counsel, Eugene S. Ives, Esq., and moves this court to select another judge to try the above entitled cause, for the reason that William F. Cooper, judge of the Superior Court of said Pima County, Arizona, is disqualified from trying the same; and having filed

374 and presented, in support of said motion the affidavit of the said Albert Steinfeld, alleging that on account of the bias of said William F. Cooper, judge of said Superior Court, he, the said Albert Steinfeld, cannot obtain a fair and impartial trial of the said action;

It is therefore ordered that said motion be granted, and that Hon. Fred Sutter, a judge of the Superior Court of the State of Arizona, in and for the County of Cochise, be and he is hereby selected to try said cause.

And afterwards, and upon the same day, the following order was had and entered of record in said court in said cause, which said order is in words and figures as follows, to-wit:

(Title of Cause.)

I, having requested Honorable Fred Sutter, judge of the Superior Court of the County of Cochise, State of Arizona, to preside at the hearing of plaintiff's motion for judgment, decree and orders, Case No. 3496, Louis Zeckendorf, Plaintiff, against Albert Steinfeld, Defendant, and he having consented thereto, I hereby appoint the Honorable Fred Sutter to preside in this court for such period as may be necessary and convenient to dispose of said matter.

375 And afterwards, and upon the same day, the following order was had and entered of record in said court in said cause, which said order is in words and figures as follows, to-wit:

(Title of Cause.)

This matter came on this day regularly to be heard upon plaintiff's motion for judgment, decrees and orders herein, F. H. Herford, Esq., and E. A. Meserve, Esq., appearing as counsel for the plaintiff, and Eugene S. Ives, Esq., and Francis J. Heney, Esq., counsel for the defendant.

Argument of the respective counsel was had, and by stipulation by counsel for defendant herein, certain motions proposed to be filed by the defendant are to be filed by Wednesday, March 5th, 1913.

It is further stipulated by and between counsel for the respective parties hereto that this cause be submitted on briefs and that the counsel for plaintiff herein have ten (10) days in which to file plaintiff's brief and counsel for the defendant have twenty (20) days thereafter to file defendant's brief in answer thereto, and counsel for plaintiff have ten (10) days thereafter to file plaintiff's reply brief.

376 And afterwards, and upon to-wit: The same day, the following other order was had and entered of record in said court in said cause, which said order is in words and figures as follows, to-wit:

(Title of Cause.)

Honorable Fred Sutter, judge of the Superior court of the State of Arizona, in and for Cochise County, having been requested by the judge of the Superior Court in and for Pima County, to preside at the hearing of plaintiff's motion for judgment, decrees and orders in case No. 3496, Louis Zeckendorf vs. Albert Steinfeld, the judge of the Superior Court of said Pima County being disqualified to preside at the hearing of said motion; and the said Honorable Fred Sutter having, in pursuance of said request, presided at the hearing of said motion; and having incurred necessary expenses in complying with said request, in the sum of \$20.90;

It is ordered that the County Treasurer of said Pima County, do pay to the said Honorable Fred Sutter the sum of \$20.90, as provided by law.

And afterwards, and upon the 16th day of June, 1913, the same being one of the regular juridical days of said court, the following order, was had and entered of record in said court in said cause, which said order is in words and figures as follows, to-wit:

(Title of Cause.)

Argument of counsel for the respective parties hereto having been had at a previous session of this court before the Honorable Fred Sutter, judge of the Superior Court of the State of Arizona, in and for Cochise County, upon the plaintiff's motion for judgment, decree and orders, and by stipulation by and between the respective parties hereto, the matter was submitted on briefs for the court's con-

sideration and decision: Comes now Frank E. Curley, Esquire, appearing as counsel for the plaintiff herein, in the absence of F. H. Hereford, Esquire, and E. A. Meserve, Esquire, and S. L. Pattee, Esquire, and Gerald Jones, Esquire, appearing as counsel for the defendants in the absence of Eugene S. Ives, Esquire, and Francis J. Heney, Esquire, and Selim M. Franklin, Esquire, appearing as attorney for the receiver; and the court being now fully advised in the premises does grant plaintiff's motion for judgment, and orders that judgment be entered herein in favor of the plaintiff.

It appearing to the court that a receiver has been heretofore appointed, but that the amount of said receiver's bond was never fixed, it is now ordered by the court that the amount of the receiver's bond be fixed in the sum of \$100,000.00.

Application was made by the attorneys representing the defendants herein for an extension in time to argue the matter of attorney fees, which application was by the court denied. Argument of the respective parties hereto was then had on the matter of attorney fees to be allowed plaintiff, and the further argument on said matter was continued to Tuesday, June 17th, 1913, at 10 o'clock A. M.

And afterwards, and upon the 17th day of June, 1913, the same being one of the regular juridical days of this court, the following order was had and entered of record in said court in said cause, which order is in words and figures as follows, to-wit:

(Title of Cause.)

This cause having been continued from yesterday's session of this court, come now the parties hereto, and further argument was had on the matter of attorney fees to be allowed plaintiff herein; and the court being fully advised in the premises does order that judgment be entered for plaintiff for attorney fees in the sum of 10 per cent of the amount recovered.

Counsel for the defendants then made formal offer to introduce testimony touching the value of the services rendered by counsel and to prove a reasonable amount to be allowed for attorney fees which offer was by the court denied; to which ruling of the court counsel for the defendants excepts.

Counsel for defendants then gave notice in open court that motion for rehearing on motion to modify judgment would be filed.

On motion of counsel for defendants, it is ordered that a stay of execution be granted until July 1st, 1913.

It was by the court ordered that counsel for respective parties be given until July 1st, 1913, to prepare and file a form of judgment in this case, at which time judgment would be signed and filed herein.

It was further ordered that any motions presented within the ten days allowed from time of rendering judgment, would be taken up on July 1st, 1913.

(Title of Cause.)

380 Honorable Fred Sutter, judge of the Superior Court of the State of Arizona, in and for the County of Cochise, having been requested by the judge of the Superior Court in and for the County of Pima, to preside in this court for such period as may be necessary to dispose of plaintiff's motion for judgment, decree and orders in case No. 3496, Louis Zeckendorf vs. Albert Steinfeld, the judge of the Superior Court of said Pima County being disqualified; and the said Honorable Fred Sutter having, in pursuance of said request incurred necessary expenses amounting to the sum of \$15.40;

It is ordered that the County Treasurer of said Pima County, do pay to the said Honorable Fred Sutter, the sum of \$15.40, as provided by law.

And afterwards and upon the 1st day of July, 1913, the same being one of the regular juridical days of this court, the following order was had and entered of record in said court in said cause, which order is in words and figures as follows, to-wit:

(Title of Cause.)

On request of counsel for defendants, herein, it is ordered that the hearing on form of judgment and motions on file herein be continued until 2 o'clock P. M. of this day.

381 And afterwards, and upon the same day, the following other order was had and entered of record in said court in said cause, which order is in words and figures as follows, to-wit:

(Title of Cause.)

This being the time set for hearing on form of judgment to be entered in this case, and also various motions filed by the defendants herein, come now E. A. Meserve, Esquire, counsel for the plaintiff, and Frank E. Curley, Esquire, appearing as one of the counsel for the plaintiff in the absence of F. H. Hereford, Esquire; and come also Francis J. Heney, Esquire, counsel for the defendants, and Gerald Jones, Esquire, appearing as one of the counsel for the defendants, in the absence of Eugene S. Ives, Esquire, and comes also Selim M. Franklin, Esquire, counsel for the receiver.

Argument of the respective counsel was had on the matter of form of judgment to be signed and filed herein.

Exceptions and objections to plaintiff's motion for judgment was then filed by counsel for the defendants herein, and the court being fully advised in the premises does order that a blanket order

382 be entered, overruling all objections offered to the entry of judgment herein. Argument on the defendants' several motions was had by respective counsel, and the court being fully advised in the premises does deny defendants' motion to modify judgment; defendants' motion to set aside judgment, and defendants'

motion in arrest of judgment, to which ruling of the court in denying said motions, counsel for the defendants except.

The defendants' motion for new trial herein having been presented, and argument had by the respective parties hereto, and the court being fully advised in the premises, does deny said motion.

The defendants' amended motion to modify judgment and discharge the receiver, filed June 28th, 1913, was taken up by the court and the court being fully advised in the premises, does deny said motion.

The form of judgment was then by the court signed and filed herein.

Counsel for the defendants thereupon asked the court for an order staying the judgment, as to the first cause of action, for a period of sixty days. The court thereupon ordered that a stay of execution be granted for a period of forty days, to which ruling of the court counsel for the plaintiff excepts.

383 And afterwards and upon to-wit: the same day, the following other order was had and entered of record, which order is in words and figures as follows, to-wit:

(Title of Cause.)

To the Superior Court of Pima County, State of Arizona, and the Honorable Presiding Judge thereof:

Now comes H. W. Fenner, Receiver herein, and respectfully represents that it is necessary for him to employ counsel to advise and assist him in the matter of his said Receivership. Wherefore he hereby asks this court for an order authorizing him to employ such counsel as he may deem necessary, the compensation of such counsel to be hereafter determined by this court or the presiding judge thereof.

Dated at Tucson, Arizona, July 1, 1913.

H. W. FENNER, Receiver.

Upon reading and filing the foregoing petition and it appearing that it is necessary for H. W. Fenner, Receiver, herein, to employ counsel to advise, aid and assist him as such Receiver;

384 It is hereby ordered that said H. W. Fenner, Receiver, and he is hereby, authorized to employ such counsel as he may deem necessary, for the purposes aforesaid, the compensation of such counsel to be hereafter determined and allowed this court or the Judge thereof.

Dated this 1st day of July, 1913.

(Signed)

FRED SUTTER, Judge.

385 And afterwards, and upon the same day, the following other order was had and entered of record in said court said cause, which order is in words and figures as follows, to-wit:

(Title of Cause.)

The following order was ordered spread upon the minutes:

Honorable Fred Sutter, judge of the Superior Court of the State of Arizona, in and for the County of Cochise, having been requested by the judge of the Superior Court in and for Pima County, State of Arizona, to preside at the hearing and dispose of motions in the above entitled cause, the judge of the Superior Court of said Pima County, being disqualified to preside in said cause; and the Honorable Fred Sutter having, in pursuance of said request ruled on said motions in said cause, and having incurred necessary expenses in complying with said request, in the sum of \$20.65;

It is ordered, that the County Treasurer of said Pima County do pay to the Honorable Fred Sutter the sum of \$20.65.

And afterwards, and upon the 12th day of August, 1913, the same being one of the regular juridical days of this court, the following order was had and entered of record in said Court in said cause, which order is in words and figures as follows, to-wit:

(Title of Cause.)

Now come the defendants and give this their notice of
386 appeal to the Supreme Court of Arizona from the judgment rendered on the first cause of action in the cause in this court entitled Louis Zeckendorf, plaintiff, vs. Albert Steinfeld, R. K. Shelton, J. N. Curtis, Silver Bell Copper Company, a corporation, Mammoth Copper Company, a corporation, defendants, said cause being numbered on the records and files of said court 3496, which said judgment was rendered on the 16th day of June, 1913, and is in the words and figures following, to-wit:

"That Albert Steinfeld upon the first cause of action set forth in plaintiff's complaint herein, pay to Hiram W. Fenner as receiver of the Silver Bell Copper Company, for and on behalf of, and as the property of the Silver Bell Copper Company, the sum of one hundred twenty-seven thousand, six hundred twenty-six dollars and seventy-five cents, (being the amount of one hundred forty-five thousand seven hundred forty-three dollars and seventy-five cents, less the sum of eighteen thousand, one hundred seventeen dollars), together with interest thereon at the rate of six (6) per cent per annum from January 16, 1904, to date, viz: July 1, 1913, said interest amounting to seventy-two thousand four hundred twenty-eight dollars and eighteen cents, making a total at this date, principal and interest
of two hundred thousand and fifty-four dollars and ninety-
387 three cents; and that the said Silver Bell Copper Company have judgment against the said Albert Steinfeld for said sum of two hundred thousand and fifty-four dollars and ninety-three cents, with interest from date until paid, at six per cent per annum. And that execution issue therefor against the said Albert Steinfeld and his property."

"That Albert Steinfeld upon the first cause of action in said complaint set forth, pay to Hiram W. Fenner, the receiver of the said

Silver Bell Copper Company for and on behalf of, and as the property of the said Silver Bell Copper Company, the further sum of one hundred thousand dollars, together with interest thereon at the rate of six (6) per cent per annum from May 20, 1903, to date, viz: July 1, 1913, said interest amounting to sixty thousand, eight hundred thirty-three dollars and thirty-three cents, making a total amount at this date, principal and interest, of one hundred and sixty thousand eight hundred thirty-three dollars and thirty-three cents; and that the said Silver Bell Copper Company have judgment against the said Albert Steinfeld for the said sum of one hundred sixty thousand eight hundred thirty-three dollars and thirty-three cents, with interest from date till paid at six per cent per annum, and that execution issue therefor against the said Albert Steinfeld and his property.

388 "That the said Albert Steinfeld upon the first cause of action in said complaint set forth, pay to the said Hiram Fenner, receiver of the said Silver Bell Copper Company as receiver, for and on behalf of, and as the property of the said Silver Bell Copper Company, the further sum of twenty-five thousand six hundred fifty dollars, together with interest thereon from January 16, 1904, to date, viz: July 1, 1913, at six (6) per cent per annum amounting to the sum of fourteen thousand, six hundred and thirteen dollars and eleven cents, said principal and interest amount all told, this 1st day of March, 1913, to forty thousand three hundred and sixty-three dollars and eleven cents; and that the Silver Bell Copper Company do have judgment against the said Albert Steinfeld for the said sum of forty thousand three hundred and sixty-three dollars and eleven cents, with interest from date till paid, at six per cent per annum, but that execution therefor do not issue till hereinafter ordered. That the said Albert Steinfeld render an account of all moneys legally and lawfully paid out by him by reason of a garnishment served upon him in the case of S. M. Frank, plaintiff, vs. Silver Bell Copper Company described and referred to in said findings twenty-nine and thirty-five herein; that in such account

the said Steinfeld be allowed interest at the rate of six per cent per annum upon the said sum from January 16, 1904, till the date of judgment or settlement of the said garnishment proceedings; and that he further be allowed interest at the rate of six (6) per cent per annum from the date of the said judgment or settlement of the said garnishment proceedings to the date of the allowance of his said account on such sum if any as was paid out by him and allowed by the court by reason of such garnishment proceedings. That execution therefor issue against the said Albert Steinfeld and his property for such balance if any of the said sum of forty thousand three hundred and sixty-three dollars and eleven cents as upon said accounting is found due by said Steinfeld to said Silver Bell Copper Company."

And do further give this their notice of appeal from that judgment or portion of judgment in said cause rendered on the 16th or 17th day of June, 1913, being in the words and figures following:

"That plaintiff out of the said moneys recovered and to be recovered

ered by Silver Bell Copper Company, from the said Albert Steinfeld, do have and recover of and from the said Silver Bell Copper Company, and the receiver of the said Silver Bell Copper Company is hereby authorized and directed to pay to plaintiff as additional attorneys' fees for said Honorables E. A. Meserve and Frank H. Hereford, for bringing this action, and the prosecution of the same up to and including the entry of this judgment the sum of forty thousand and twenty-five dollars and thirteen cents, with interest thereon from date till paid, at the rate of six (6) per cent per annum."

And the defendants give this their notice of appeal from the whole of said judgment rendered in said cause and court on the 16th or 17th day of June, or both said days, said judgment having been signed and dated on the 1st day of July, 1913, insofar as the first cause of action thereof is concerned.

And the defendants further give this their notice of appeal from the order denying the defendants' motion for a new trial of the first cause of action in said case; and from the order of the court denying the defendants' motion to set aside the said judgment on the first cause of action in said case; and from the order of the court denying defendants' motion to modify the said judgment on the first cause of action in said case; and from the order of the court denying the defendants' motion to discharge the receiver appointed in said case, all of which orders were made on the 1st day of July, 1913, and the defendants give this their notice of appeal to the Supreme Court of Arizona from each and all said orders in said cause.

Said notice of appeal being given in open court on the 12th day of August, 1913.

And afterwards, and upon the same day, the following other order was had and entered of record in said Court in said cause, which order is in words and figures as follows, to-wit:

(Title of Cause.)

Now come the defendants and give this their notice of appeal to the Supreme Court of Arizona from the judgment rendered on the second cause of action in the case in this court entitled Louis Zeckendorf, plaintiff, vs. Albert Steinfeld, R. K. Shelton, J. N. Curtis, Silver Bell Copper Company, a corporation, Mammoth Copper Company, a corporation, defendants, said case being numbered on the records and files of said court 3496, which said judgment was rendered on the 16th day of June, 1913, being in the words and figures following:

"That the said Albert Steinfeld and his bondsmen on appeal, Epes Randolph, Leo Goldschmidt, George Pusch and Fred Fleishman, upon the second cause of action in said complaint set forth, pay to Hiram W. Fenner, the receiver of said Silver Bell Copper Company, for and on behalf of, and as the property of the said Silver Bell Copper Company, and that the said Silver Bell Copper Company do have judgment against the said Albert Steinfeld, Epes Randolph, Leo Goldschmidt, George Pusch and Fred Fleish-

man, for the further sum of twenty thousand, eight hundred and fifty dollars, with interest thereon at the rate of six (6) per cent per annum, from the 20th day of January, 1904, to the 30th day of July, 1908, amounting, principal and interest, on the said 30th day of July, 1908, to twenty-six thousand, five hundred and fourteen dollars and twenty-five cents, together with interest on said twenty-six thousand five hundred and fourteen dollars and twenty-five cents, at the rate of six (6) per cent per annum from said July 30, 1908, till paid; and that execution issue therefore against the said Albert Steinfeld, Epes Randolph, Leo Goldschmidt, George Pusch, and Fred Fleishman, and each thereof and their property and the property of each thereof."

and from the whole of said judgment in so far as it exceeds in amount and differs from this judgment on the second cause of action heretofore and on the 30th day of July, 1908, rendered in said cause, which judgment was duly affirmed by the Supreme Court of the Territory of Arizona and the Supreme Court of the United States.

And the defendants further do give this their notice of appeal from the order of the court denying their motion to modify the said judgment on the second cause of action by eliminating the said excess and difference; and from the order of the court denying their motion to set aside the said judgment on the second cause of action in so far as it differs from or disturbs the said judgment of July 30th, 1908, duly affirmed, as aforesaid, all of which orders were made on the first day of July, 1913.

And the defendants do give this their notice of appeal to the Supreme Court of Arizona from each and all of said orders of said court in said cause.

Said notice of appeal being given in open court on the 12th day of August, 1913.

And afterwards and upon to-wit: the 22nd day of September, 1913, the same being one of the regular juridical days of this Court, the following order was had and entered of record, which said order is in words and figures as follows, to-wit:

Title of Cause.

Exceptions having been filed to the sufficiency of the sureties on the Supersedeas Bond herein, and by stipulation between counsel for the respective parties hereto, this day having been set for the justification of the said sureties, come now Eugene S. Ives, Esquire, and

394 S. L. Kingan, Esquire, counsel for the appellants herein, and comes Frank E. Curley, Esquire, appearing as counsel for the appellee in the absence of E. A. Meserve, Esquire, and Frank H. Hereford, Esquire, the attorneys of record, and the Justification of sureties proceeds as follows: Counsel for the appellants called the following named sureties, to-wit: Epes Randolph, Leo Goldschmidt, L. J. F. Iager, Lilly B. Schrader, Fred Fleishman, J. Knox Corbett, George Pusch, Hugo J. Donau, S. Heineman, L. H. Manning, J. P.

Hohusen, W. J. Corbett, John Heidel, G. W. Atkinson, Alex Rossi, and John B. Ryland, who were duly sworn, examined and cross-examined. Frank E. Curley, Esquire, thereupon waived the justification of E. Titcomb and W. D. Coberly.

The stipulation filed herein providing that the Court may adjourn this matter from time to time until all of the sureties on said bond have been examined, it is therefore ordered that this matter be continued until Friday, September 26th, 1913, at which time the examination of the three remaining sureties on said bond may be had.

And afterwards, and upon to-wit the 23rd day of September, 1913, the following other order was had and entered, in this Court, which said order is in words and figures as follows, to-wit:

Title of Cause.

395 Comes now Gerald Jones, Esquire, as counsel for the appellants herein, in the absence of Eugene S. Ives, Esquire, and S. L. Kingan, Esquire, and comes also Frank E. Curley, Esquire, as counsel for the appellee in the absence of E. A. Meserve, Esquire, and Frank H. Hereford, Esquire, and request the Court to hear the examination of one of the sureties on the appeal and superedeas bond herein, which request was by the Court granted. Counsel for the appellant thereupon called M. J. King, one of the sureties on said bond, who was sworn, examined and cross-examined. The further hearing in this cause was by the Court continued until Friday, September 26th 1913.

THE STATE OF ARIZONA,
County of Pima, ss:

I, S. A. Elrod, Clerk of the Superior Court of the State of Arizona, in and for the County of Pima, do hereby certify that I have compared the foregoing copy of Minute Entries, * * * in case No. 3496, Louis Zeckendorf, Plaintiff vs. Albert Steinfeld, et al., Defendants, with the original records of the same remaining in this office, and that the same are correct transcripts therefrom, and the whole of said original records.

Witness my hand and the seal of said Court affixed this 24th day of September, 1913.

[SEAL.]

S. A. ELROD,
Clerk of said Superior Court,
By OLIVE G. FAILOR,
Deputy Clerk.

396 And on to-wit: the fourth day of November, 1913, being one of the regular juridical days of said Supreme Court, the following order, inter alia, was had and entered of record in said cause, in words and figures following, to-wit:

Title of Cause

At this day, it is ordered that the motion of Hiram W. Fenner, Receiver of Silver Bell Copper Company, to be substituted for said Silver Bell Copper Company as a party in said case, and to enter in the record the name of Selim M. Franklin as his attorney, be and the same is hereby granted, and the said Hiram W. Fenner, as Receiver of Silver Bell Copper Company, is hereby substituted for said Company in said case in this court.

And on to-wit: the fourth day of December, 1913, came the appellant, Albert Steinfeld, by his attorneys and filed in the Clerk's office of said Supreme Court in said entitled cause, his
397 certain brief containing his assignment of errors, said assignment of errors being in words and figures following, to-wit:

I.

Assignment of Errors.

The Superior Court erred in granting plaintiff's motion for judgment for the reason that it was its duty consistently with the opinion of the Supreme Court of the United States and in accordance with right and justice and the laws of the United States to proceed with a trial de novo upon the first cause of action; and the Superior Court erred in holding that it had no discretion to proceed with a trial de novo upon the first cause of action, and in failing to proceed with a trial de novo upon the first cause of action, and in refusing to examine the records, proceedings, evidence and papers in the case which were before it upon such motion for judgment, for the purpose of ascertaining whether or not, in the exercise of its sound discretion, it should proceed with a trial de novo upon said first cause of action; and in refusing to exercise its sound discretion, or any discretion, in the matter of proceeding, or of refusing to proceed, with a trial de novo upon said first cause of action, and in holding that the opinion and judgment of the Supreme Court of the United States in effect peremptorily required it to enter judgment in favor of Louis Zeckendorf and the Silver Bell Copper Company, upon the findings of fact which were certified to the Supreme Court of the United States on appeal,
398 by the Supreme Court of the Territory of Arizona, for the following reasons, among others which will be hereafter urged, to-wit:

a. The Supreme Court of the United States possessed the power and jurisdiction to reverse the judgment of the Supreme Court of the Territory upon the first cause of action, and to specifically direct a judgment in favor of the plaintiff to be entered by the Supreme Court of the State of Arizona or by the District Court of the Territory of Arizona, or its successor, the Superior Court of the State of Arizona. But the Supreme Court of the United States did not specifically direct a judgment in favor of

Zeckendorf or of the Silver Bell Copper Company to be entered by the Supreme Court of the State of Arizona, or by the Superior Court of such state, and it did direct that such further proceedings should be had upon said first cause of action by the Supreme Court of the State of Arizona and the Superior Court of the State of Arizona, as were not inconsistent with the opinion and judgment of the Supreme Court of the United States, and as would be in accordance with right and justice and the laws of the United States; and it was the duty of the Superior Court of the State of Arizona to examine into the evidence and the records, proceedings and papers on file in said case before it, and to determine therefrom, by the exercise of its sound discretion, the question as to whether or not it would be consistent with the opinion and judgment of the Supreme Court of the United States and in accordance with right and justice and the laws of the United States for it to proceed with a trial de novo upon said first cause of action, and to act accordingly.

b. The question as to whether or not the stockholders at their meeting of December 26, 1903, had the intent to rescind the contract of May 20, 1903, in toto or whether they had the intent to rescind that contract only as to the right to the custody of the proceeds of the sale, is an ultimate fact which is essential to support a judgment either in favor of Steinfeld, or in favor of Zeckendorf and the Silver Bell Copper Company. It was the duty of the trial court to make a finding of fact one way or the other, upon this question of intent, and its failure to do so constituted good ground for the reversal of any judgment which it might have entered in favor of either party to the suit. Neither the territorial Supreme Court nor the United States Supreme Court possessed any jurisdiction to make a finding of this ultimate fact, unless the trial court did find probative facts from which this ultimate fact followed as an inference of fact so inevitably and necessarily as to thus become in effect merely a question of law. This could not be so, unless it appears from the probative facts which were found by the trial court that the non-existence of the ultimate fact which it is desired to infer therefrom must, upon every conceivable theory of which the case will admit, be inconsistent with the probative facts which are found. If the trial court failed to find the ultimate fact, and the inference in question does not follow so inevitably and necessarily as to be a matter of law, the failure of the trial court to make a finding of the ultimate fact is fatal to the judgment, and a trial de novo must be had. The appellate court cannot draw the necessary inference of this ultimate fact which is essential to support a judgment. To do so would be to usurp the functions of the trial court. The trial court itself must draw its own inference upon which its judgment is based, and it cannot be excused from the performance of this indispensable duty, unless the inference follows so inevitably and necessarily from the facts which are found as to become a question of law; and if the ultimate fact does not inevitably and necessarily follow as the only

inference consistent under every conceivable theory of the case with the probative facts found by the trial court, then the findings are not only insufficient to support the judgment, but it is as
401 though there was a total absence of a finding upon the material issue involved.

c. In order to maintain a judgment in favor of Zeckendorf and the Silver Bell Copper Company, it was necessary for the trial court to specifically find that Steinfeld, in voting to rescind the contract of May 20, 1903, at the stockholders' meeting of December 26, 1903, made a mistake as to the terms and meaning of the resolution of rescission, and that he would not have voted for the same as it was adopted if he had not made such mistake, and that he intended to vote for a resolution which would rescind the contract of May 20, 1903, only in so far as it affected the right to the custody of the proceeds of the sale of the mines, and which would ratify and continue that contract in full force and effect in every other respect, and particularly in so far as it vested the ownership of all the proceeds of the sale of the mines in the Silver Bell Copper Company. The trial court did not make any such finding or findings of fact, or any finding or findings of fact which are substantially to that effect. Neither did the trial court make any finding or findings of probative facts from which such ultimate fact or facts followed as an inference of fact so inevitable and necessarily as to become a question of law merely. Hence a judgment in favor of Zeckendorf or the Silver Bell Copper Com-
402 pany cannot be based upon the findings of fact which were made by the trial court. The only finding of fact which was made by the trial court upon the question of the rescission of the contract of May 20, 1903, is entitled finding No. "XXXII" and begins as follows, to-wit: "That at said meeting of December 26, 1903, the following proceedings and discussions took place, to-wit: 'Meeting of the stockholders of the Silver Bell Copper Company, held at the office of Smith & Ives, Tucson, Arizona, December 26, 1903, at four p. m.'" Then follows what appears to be the minutes of the stockholders' meeting, and at the end thereof appears the signature, "R. K. Shelton, Secretary." Mr. Shelton was the secretary, at that time, of the Silver Bell Copper Company. These minutes of the stockholders' meeting appear to contain a complete statement of all that was said and done at that meeting by each of the stockholders and by Eugene S. Ives as attorney for Steinfeld, and by Judge Barnes at attorney for Zeckendorf; but there is no finding of fact by the trial court to that effect and non constat that much more was said and done at said meeting. It appears from these minutes that a resolution was introduced by R. K. Shelton reading as follows:

"Resolved that the agreement executed on May 20, 1903, by the president and secretary of the corporation, the Mammoth
403 Copper Company and Albert Steinfeld be and the same is hereby rescinded, and that the said agreement and resolution passed on said day be declared null and void."

It further appears that at the request of Judge Barnes, a copy

of the contract of May 20, 1903, was attached to this resolution, and that Judge Barnes then said:

"We have no objection to passing that resolution on behalf of Mr. Zeckendorf. I don't care to discuss the questions you have gone over. I don't know as anything is to be gained by it. If the contract of May 20 is rescinded, that is all we care for on that point."

It further appears that immediately after this statement was made by Judge Barnes, a vote was taken upon the passage of the resolution, and that L. Zeckendorf voted 250 shares yes, and that Albert Steinfeld voted 249 shares yes, and that Albert Steinfeld, trustee, voted 330 shares yes, and that R. K. Shelton voted one share yes, and that J. N. Curtis voted 170 shares yes, and that this total of 1,000 shares constituted all of the stock of the Silver Bell Copper Company. Immediately after the report of said meeting and the signature "R. K. Shelton, Secretary," said finding "XXXII" contains the following language, to-wit: "That attached to said resolution above set out was a copy of the agreement of May 20, 1903, set out in full in finding XXV above." This is clearly a
404 finding of a minor probative fact.

The only other finding of a probative fact on this subject which appear in said finding "XXXII," is as follows:

"That in the stockholders' meeting held on the 26th day of December, 1903, herein set out, plaintiff in voting to rescind said agreement of May 20, 1903, and the resolution hereinabove mentioned, did not understand or know or believe that any body claimed or would claim that the action taken on that day by the stockholders of the Silver Bell Copper Company would operate to give either Albert Steinfeld or the Mammoth Copper Company any right or claim to any proceeds of said sale."

By the word "plaintiff" the trial court means Louis Zeckendorf, as a matter of course. It is transparently apparent that the trial court purposely avoided making any finding of fact to the effect that Zeckendorf, in voting to rescind said agreement of May 20, 1903, did not understand or know that he was voting to rescind said agreement in toto, or that he did not intend to vote to rescind it in toto, or even that he did not understand or know what the legal effect and consequences of his action would be, or even that he did not understand or know that his vote in favor of said resolution would operate to give Steinfeld or the Mammoth Copper Company a right or claim to some of the proceeds of
405 the sale of said mines. Either the trial court could not conscientiously make such a finding of fact from the whole of the evidence in the case which was before it on this point, or else it considered itself precluded from so doing by the law of the case, in so far as it was concerned, as previously established on the first appeal by the Supreme Court of the Territory. But whatever may have been its reason, it is an undisputable fact that the trial court did not make any finding of fact even substantially to the effect that Zeckendorf, in voting to rescind said agreement of May 20, 1903, did not intend to rescind it in toto, or even

that he did not understand or know that his action in voting for the resolution offered by Shelton would operate to rescind the contract of May 20, 1903, in toto. It is wholly immaterial what Zeckendorf may have understood or known or believed that somebody else would claim would be the effect of his action in voting for that resolution. The real and only question is, What did Zeckendorf understand at the time in regard to the same, and what did Zeckendorf intend at the time in regard to the same? Upon these questions, the trial court was significantly silent in the face of the overwhelming testimony to the contrary of the contentions made by Zeckendorf and his attorneys, as it appears in the transcript of the record on appeal now before this court in this case.

406 But there is not so much as an intimation on the part of the trial court in its findings of fact, or in its so-called findings of fact, to the effect that Albert Steinfeld, in voting to rescind said agreement of May 20, 1903, or in voting to adopt the aforesaid resolution of rescission, to which a copy of said agreement was attached, did not thereby intend to rescind said agreement in toto, or that he made any mistake of fact as to the contents of the resolution of rescission for which he was voting, or that he did intend, when so voting, to rescind said agreement only in so far as it affected his right to the custody of the proceeds of the sale of the mines, or that in so voting for said resolution he did intend to acquiesce in a modification of said contract of May 20, 1903, in so far only as it affected his right to the custody of the proceeds of the sale of said mines. Such a finding of fact by the trial court would have been directly and absolutely contrary to the undisputed evidence in the case, and the Supreme Court of the United States, in its opinion in this case, says that "in interpreting the action of the stockholders in passing the resolution, the facts and circumstances surrounding them may legitimately be looked to." This is undoubtedly the law of the case, and it undoubtedly always was the law on this subject. But this means, of course, all of the facts and circumstances surrounding the parties at the time of their action, and consequently it means all of their conversations and declarations and actions which were not too remote in time, and which consequently throw light upon the intent with which the parties and each of the parties acted in voting for the resolution of rescission at the stockholders' meeting on December 26, 1903.

At the very end of said finding "XXXII" the trial court said: "Nor did the directors in good faith understand or believe that the stockholders intended to instruct them to rescind any portion of the agreement and resolution other than that relating to the indemnity agreement hereinabove mentioned."

It appears from finding "XXXIII" which was made by the trial court and was certified to the Supreme Court of the United States by the Supreme Court of the Territory of Arizona, that the directors, Curtis and Shelton, executed a formal agreement of rescission on behalf of the Silver Bell Copper Company, with Steinfeld and the Mammoth Copper Company, immediately after the adjournment of the stockholders' meeting on December 26, 1903, at a meeting of the

board of directors which was then held, and that Steinfeld refrained from voting as a director upon the resolution for the execution of such rescission, upon the ground that he was an interested party. Hence it is obvious that by the word "directors" in the foregoing finding of fact or conclusion of law, the trial court meant Curtis and Shelton only, and did not include Steinfeld, because he did not participate as a director in rescinding the agreement of May 20, 1903. But it is wholly immaterial whether the directors acted in good or bad faith, or whether they understood or believed that the stockholders so intended to instruct them, or not, for the reason that no action on the part of the directors was necessary in order to accomplish the rescission in toto of the contract of May 20, 1903. The rescission of that voidable contract which was made between Steinfeld and the Silver Bell Copper Company, at a time when Steinfeld was a member of the board of directors of that corporation, and when Shelton was his dummy, was avoidable at the instance of any stockholder who had not acquiesced in the same, and consequently it rested with Louis Zeckendorf, by his action at that stockholders' meeting, to either ratify and affirm that contract in toto, or rescind and cancel it in toto by his vote. Zeckendorf could either accept or reject it in toto by his own vote. Zeckendorf could not modify it in any particular, however, and maintain it in other respects except by and with the express and specific consent of Steinfeld. Even with Steinfeld's consent to any modification, it was necessary that the modified agreement should be afterwards authorized and executed by the Silver Bell Copper Company through the action of its board of directors, in addition to the authorization by its stockholders who possessed no power to make or execute a contract on behalf of the corporation. The Board of Directors never authorized the execution of and never executed any modified rescission and there is no finding that it did, and hence no such modified rescission was executed.

The findings of fact which were certified to the Supreme Court of the United States by the Supreme Court of the Territory are a verbatim copy of the findings of fact which were made by the trial court, with the slight addition of certain facts which had no bearing upon this particular issue, and consequently the findings of fact which were certified by the Supreme Court of the Territory to the Supreme Court of the United States will not support a judgment in favor of Zeckendorf or of the Silver Bell Copper Company.

d. Upon the appeal from the first trial of this case, the Supreme Court of the Territory of Arizona reversed the judgment of the trial court upon the ground that the intent of the parties at the stockholders' meeting of December 26, 1903, in voting for the resolution to rescind the contract of May 20, 1903, was not material, for the reason that there was no ambiguity about the resolution of rescission as adopted, and because there was no dispute about the fact that all of the stockholders voted in favor of said resolution, and that consequently if any mistake was made by them in so voting, it was a mistake of law as to the legal effect of said resolution, and was not a mistake of fact, and that the parties could not

be relieved against their mistake of law, under the circumstance. On the first trial, the judgment of the District Court was in favor of Zeckendorf and the Silver Bell Copper Company on the first cause of action, and Steinfeld, as the appellant, assigned, as the paramount error upon which he relied, the contention that the evidence did not support the finding of fact which had been made by the District Court, to the effect that the stockholders at their meeting of December 26, 1903, did not intend to rescind the contract of May 20, 1903, and did not understand that they were so doing by their action in voting for said resolution, and that they did intend to rescind the contract only in so far as it related to the custody of the proceeds of the sale of the mines. This assignment of error was not considered or acted upon by the Supreme Court of the Territory, for the reasons as given in its opinion reversing the judgment of the District Court, that it was immaterial whether the evidence was sufficient to support such a finding or not because the intent of the parties could not be

inquired into by the trial court, inasmuch as the undisputed evidence disclosed the fact that they had knowingly voted

411 for the resolution to rescind the contract of May 20, 1903, in toto, and if either or both of them made any mistake in so doing it was a mistake of law and not of fact. This decision of the Supreme Court of the Territory became and was the law of the case upon its second trial in so far as the District Court and the parties to the action were concerned. The case was retried under a stipulation by which the same identical evidence which was produced at the first trial was used, and none other was introduced. At the second trial the District Court treated the opinion of the Supreme Court of the Territory as being the law of the case, and consequently it purposefully refrained from making any finding of fact whatever as to the intent of either Zeckendorf or Steinfeld in voting in favor of the resolution of rescission at the stockholders' meeting of December 26, 1903. Moreover, the District Court at the second trial rendered and entered judgment in favor of Steinfeld upon the first cause of action on the findings of fact which it did make. Consequently Steinfeld was thus deprived of all opportunity of ever having any court pass upon the question as to whether or not all of the evidence which was taken in the case, when considered together, will support a finding

412 of fact to the effect that Steinfeld acquiesced in any modification of the contract of May 20, 1903, or that he made any mistake in voting for the resolution of rescission of that contract in toto at the stockholders' meeting of December 26, 1903, that he intended at that meeting to vote for or acquiesce in a rescission of the contract of May 20, 1903, only in so far as it affected his right to the custody of the proceeds of the sale of the mines.

Upon this question through no fault of his own Steinfeld has never had his day in court.

The Supreme Court of the United States did not have before it for consideration all or anywhere near all of the important and material evidence upon this question. In writing its opinion and in rendering its judgment, it was confined to a consideration of that evidence only which appears in the so-called finding of fact No. "XXXII."

which was made originally by the District Court, and was thereafter perfunctorily incorporated by the Supreme Court of the Territory in its statement of the facts in the nature of a special verdict which it certified to the Supreme Court of the United States under the impression, from its view of the law as expressed in its own opinion, that the part of the evidence which there appeared and the probative facts which there appeared were utterly immaterial and of no consequence whatever, because the intent of Zeckendorf and of

413 Steinfeld when voting at the stockholders' meeting of December 26, 1903, was wholly immaterial.

Hence if the whole of the evidence in the case upon this subject is of such a nature that it will not support a finding of fact to the effect that Steinfeld acquiesced in a modification of the contract of May 20, 1903, or voted for the resolution of rescission at the stockholders' meeting of December 26, 1903, with the intent of rescinding that contract only in so far as it related to his right to the custody of the proceeds of the sale of the mines, it inevitably follows that unless a trial de novo upon the first cause of action is permitted, Steinfeld will be made to suffer a heavy penalty amounting to a small fortune in attorneys' fees alone, merely because the Supreme Court of the Territory, upon his appeal from the findings and judgment in the first trial, failed through an erroneous conception of the case to perform its duty to pass up his assignment of error to the effect that the evidence did not sustain such a finding of fact, and because the Supreme Court of the Territory erred in its view of the law on that question, and because under the law and the rules of court Steinfeld had no opportunity to have that error then and there, or at any other time, passed upon by the Supreme Court of the United States. Right

and justice and the laws of the United States cannot prevail

414 in this case, unless Steinfeld secures a trial de novo in which the vital and paramount question can be passed upon as to whether or not the evidence will sustain a finding of the ultimate fact that Steinfeld acquiesced in a modification of the contract of May 20, 1903, or had the intent when he voted at the stockholders' meeting on December 26, 1903, to rescind the contract only in so far as it related to his right to the custody of the proceeds of the sale of the mines.

See N. Y. case.

A trial de novo to enable the Superior Court of the State of Arizona to pass upon the question of this intent on the part of Steinfeld in voting for the resolution of rescission at the stockholders' meeting on December 26, 1903, is not inconsistent with the opinion and judgment of the Supreme Court of the United States, and it would be in accordance with right and justice and the laws of the United States.

e. The United States Supreme Court did not hold that it was such an inevitable and necessary inference of fact from the facts certified to it by the Supreme Court of the Territory, as to become a matter of law, that Steinfeld, in voting for the resolution at the stockholders' meeting on December 26, 1903, intended to modify the contract of May 20, 1903, only in so far as it related to the custody of the pro-

ceeds of the sale of the mines. It is impossible to concei
415 that said court intended to so hold, because its opinion and
judgment were based entirely upon the statement and fact
certified to it by the Supreme Court of the Territory of Arizona, in
cluding the fragmentary evidence only which was improperly in
cluded in said finding "XXXII," and consequently the Supreme
Court of the United States did not and could not consider the other
evidence in the case bearing on that question which, as appears from
the record upon this appeal, conclusively rebuts any presumption of
inference or conclusion that Steinfeld intended to vote for such
modification of the contract.

The opinion of the Supreme Court of the United States is merely
an argumentative statement of its reasons for holding that the judg
ment of the Supreme Court of the Territory of Arizona, affirming
the judgment of the trial court in favor of Steinfeld on the first
cause of action, is erroneous, because neither the Supreme Court of
the Territory nor the trial court made any specific finding as an ult
imate fact that the contract of May 20, 1903, was rescinded in tot
at the stockholders' meeting on December 26, 1903, and that conse
quently there was an absence of any proper finding of an essential
ultimate fact to support a judgment in favor of Steinfeld, and that
the absence of such indispensable finding was not obviated by the

finding of probative facts from which such ultimate fact would
416 follow as an inference of fact so inevitably and necessarily
as to become a question of law. The Supreme Court of the
United States argued and held that it was error for the Supreme
Court of the Territory of Arizona to draw such an inference or con
clusion from the facts stated and certified to it, for the reason that
it was a "fair inference" from the facts so stated that Steinfeld acqui
esced in a modification of the contract of May 20, 1903, in so far
only as it related to his right to the custody of the proceeds of the
sale of the mines; and that, therefore, the non-existence of this fact
was not, upon every conceivable theory of which the case would
admit, inconsistent with the probative facts so certified; and that con
sequently the ultimate fact that the contract was rescinded in tot
could not properly be drawn by the Supreme Court of the Territory
of Arizona therefrom, as the only and inevitable and necessary infer
ence of fact which alone would make those findings sufficient to
support its judgment.

f. The judgment of the Superior Court of the State of Arizona is
based upon the refusal of that court to look into the evidence and
record in this case to determine whether or not in the exercise of
sound discretion it should proceed with a trial de novo upon the first
cause of action. For this court to affirm such judgment would be in

effect to hold that a judgment should be entered against Stein
417 feld by force of the inference or presumption of a fact as to
his intent in voting at the stockholders' meeting, drawn from
a fragmentary part of the evidence, when the existence of such fact
is conclusively disproved by direct and positive evidence in the re
cord. Whereas presumptions, inferences and conclusions are indulged
to supply the place of facts; they are never allowed against ascer

tained and established facts. When these appear, presumptions, inferences and conclusions disappear.

"Presumptions may be looked on as bats of the law, following in the twilight, but disappearing in the sunshine of actual facts."

g. Even if the evidence as it appears in the record does not show conclusively that Steinfeld's intent was to rescind the contract of May 20, 1903, in toto when he voted for the resolution at the stockholders' meeting, the Superior Court should, in the absence of a specific finding upon this material question of intent, have ordered and proceeded with a trial de novo in order to give Steinfeld the opportunity to offer additional evidence as to such intent, if he so desired to do. This is imperatively so, on account of the holding of the Supreme Court of the Territory upon the first appeal, that the intent of Steinfeld and the other stockholders in so voting was immaterial, and on account of the necessary consequence of such holding, 418 to-wit, that the trial court would have been compelled to exclude as immaterial any evidence which either side might have offered upon the question of such intent, and consequently it was not necessary or even proper for either side to offer any such evidence or additional evidence at said second trial.

Assignment of Error II.

Interest.

"The court erred in rendering judgment against Steinfeld upon the first cause of action for interest upon the sum of \$27,626.75 from the 16th day of January, 1904, to July 1, 1913. Date of the judgment, such interest amounting to \$72,428.18, rendering judgment against the said Steinfeld for interest on the sum of \$100,000 from the 20th day of May, 1903, to the said first day of July, 1913, such interest amounting to \$60,833.33, for the following reasons:

1. Under and by virtue of the statutes of Arizona interest is not allowed upon money due because of the transaction set forth in the complaint.

2. Steinfeld is not chargeable with damages for unlawful detention of money, because there is no allegation in the complaint alleging any damage by reason of Steinfeld's alleged unlawful detention of such money.

419 3. Under the contract of May 20, 1903, Steinfeld was entitled to the custody of the said money and is therefore not chargeable with interest thereupon, or with damages for the detention thereof.

Assignment of Error III.

Attorneys' Fees.

The Superior Court erred in adjudging that the plaintiff, out of the moneys recovered or to be recovered from Steinfeld, should have

and recover the sum of \$40,125.73 of and from the Silver Bell Copper Company and the receiver in this case as and for attorneys' fees upon the first cause of action to be paid to Hon. E. A. Meserve and Frank H. Hereford for the bringing of this action and for the prosecution of the same up to and including the entry of such judgment by the Superior Court for the following reasons:

1. There was no evidence before the Superior Court as to the amount, nature, character or value of the services which were rendered by said attorneys in the Supreme Court of the Territory or in the Supreme Court of the United States subsequent to the second trial of this suit in the District Court of the Territory of Arizona, or even during the first trial thereof before said District Court.

2. The Superior Court erred in refusing to hear competent, pertinent, relevant and material evidence which was offered by
420 Steinfeld to and before that court at the time plaintiff's motion for judgment was up for consideration upon the question as to the amount, nature, character and value of the services performed by the attorneys for Louis Zeckendorf in this suit in the Supreme Court of the Territory of Arizona and in the Supreme Court of the United States subsequent to the second trial of this suit in and before the District Court of the Territory of Arizona.

3. The amount of attorneys' fees allowed by the Superior Court is excessive, in that the court arrived thereat by using as a basis for its judgment a much larger sum than was actually involved in this litigation.

4. The District Court of the Territory of Arizona possessed no power, jurisdiction or authority to allow a contingent fee to the attorneys for Louis Zeckendorf, which should be determined as to its amount solely or partially by the question of the amount for which any final judgment might thereafter be entered in the case; and the finding by the District Court of the Territory of Arizona upon the second trial of this case to the effect that ten per cent upon any judgment which might thereafter be finally entered in the case would be a reasonable attorneys' fee, was not based upon any evidence then before said court, nor upon any personal knowledge on
421 the part of the judge thereof as to the amount, nature, character or value of the services which might thereafter be performed by the attorneys for Louis Zeckendorf, nor as to whether or not the case would be appealed to the Supreme Court of the United States, or even to the Supreme Court of the territory by either party; and such so-called finding of fact was not within the issues made by the pleadings in the case, and was not appealable by Steinfeld, because said District Court of the Territory of Arizona rendered judgment in favor of Steinfeld upon said first cause of action upon said second trial, and rendered judgment in favor of Louis Zeckendorf and the Silver Bell Copper Company for the sum of \$2,600.00 only as and for attorneys' fees, for all legal services performed by said attorneys in this action up to and including the entry of judgment by said District Court in said action upon said second trial.

5. The Superior Court erred in basing its allowance of attorneys'

fees upon the first cause of action solely upon the aforesaid so-called finding of fact which was so made by the District Court of the Territory of Arizona upon the second trial of this case, to the effect that ten per cent upon the amount of any final judgment which might thereafter be recovered in the case would be a reasonable attorney's fee. Because the allowance for attorneys' fees must be for the reasonable value of the services actually performed by the attorneys, and the trial court must specifically ascertain and find the amount of such reasonable value from pertinent, relevant, material and competent evidence tending to prove the amount, nature, character and value of the services, or else from personal knowledge as judge on the part of the judge who tries the case of the amount, nature, character and value of the services so already actually performed in the case by such attorneys at the time such finding of fact is made by such trial court.

Assignment of Error IV.

Judgment upon Second Cause of Action.

The Superior Court erred in rendering a judgment of any kind upon the second cause of action for the reason that the affirmance by the United States Supreme Court of the judgment of the Supreme Court of the Territory affirming the judgment of the District Court of the Territory in favor of the plaintiff upon said second cause of action was a final determination of the issues in the said action and consequently no second judgment was necessary or proper and the same was obviously asked for by the plaintiff for the purpose of enlarging the amount of interest which he would receive upon said second cause of action.

423

Assignment of Error V.

The \$25,750 Garnisheed in the Franklin Case.

The Superior Court erred in awarding judgment against Steinfeld for the sum of \$25,750, being moneys in the hands of Steinfeld as garnishee in the suit brought against the Silver Bell Copper Company by Selim M. Franklin, and interest thereon from the 16th day of January, 1904, the principal and interest amounting to the sum of \$40,363.11, for the reason that there is no allegation or proof or finding that Steinfeld ever appropriated said sum to his own use, or used it for his own benefit.

At the time this action was brought the said sum of money was garnisheed in Steinfeld's hands and he was legally obligated to retain the same under said garnishment. There is no allegation or evidence or finding that after the Franklin suit was finally determined and the amount of Franklin's claim paid that Steinfeld retained the balance of the fund garnisheed in his hands for his own

benefit, or ever claimed that said balance was his own property, the fact being that such balance, if there was any, became, upon the satisfaction of the Franklin judgment, the property of the Silver Bell Copper Company, and that there was no question or dispute
 424 as to such money, and the same was not a part of the subject matter of this litigation.

The Superior Court further erred in awarding judgment against Steinfeld for this total sum of \$40,363.11, for the reason that upon the second trial of this case the District Court of the Territory of Arizona made the following finding of fact upon this question, to-wit:

"XXIX."

"That after the 21st day of May, 1903, and some time in the month of May or June, 1903, S. M. Franklin, claiming to be creditor of the said Silver Bell Copper Company, brought an action against the said Silver Bell Copper Company for the sum of \$51,500 and in said action garnisheed the sum of \$51,500 as the property of the Silver Bell Copper Company, then in the hands of said Albert Steinfeld. The said action is entitled 'S. M. Franklin, plaintiff v. Silver Bell Copper Company, defendant,' and was brought to this court. That after said garnishment was levied on said Albert Steinfeld, and some time in the month of January, 1904, said Albert Steinfeld paid back to the Silver Bell Copper Company \$25,750 said \$51,500 in his hands, retaining the other \$25,750 as security against the said garnishment under an agreement with the said Silver Bell Copper Company that he would hold and retain \$25,750 in his hands as such security against said garnishment, and that after paying to said S. M. Franklin any moneys that might be covered, or for which he might get judgment in said action, he would pay to the Silver Bell Copper Company the balance
 425 of \$25,750 so left in his hands as security after deducting the money so paid to him, said S. M. Franklin."

"The said Albert Steinfeld thereafter continued to hold and the time of commencement of this action still held said sum \$25,750 as such security, the same being the property of the said Silver Bell Copper Company."

And for the further reason that upon said trial said District Court made and entered its judgment upon this particular question as a matter in words and figures as follows, to-wit:

"It is further ordered, adjudged and decreed that Albert Steinfeld holds the sum of \$25,750, money of said Silver Bell Copper Company, in his hands as and for security to him against a liability on account of the garnishment levied on him in the action of Franklin v. Silver Bell Copper Company, said Steinfeld to account to said corporation or to the receiver of said corporation hereafter appointed for said sum immediately upon the final determination and settlement of this action, and to pay the said Silver Bell Copper Company or to such receiver the balance of said sum, if any, after deducting therefrom such sums, if any, that said Steinfeld n

properly and in accordance with law pay or have paid for the benefit of the said Silver Bell Copper Company.

"Done in open court this 30th day of July, 1908.

"JOHN H. CAMPBELL, *Judge*.

"Filed October 4, 1908."

426 And for the further reason that the appellant Steinfeld offered under his objections and exceptions to the entry of judgment by the Superior Court in this matter upon the motion of Louis Zeckendorf for judgment, to prove that he, Steinfeld, had paid out all of said original sum of \$25,750 of the money so garnisheed in his hands in the action of Franklin against Silver Bell Copper Company to said Franklin and others for and on behalf of said Silver Bell Copper Company under a judgment obtained by said Franklin in said suit in which said garnishment proceedings were had and to other persons which Steinfeld properly and in accordance with law paid for the benefit of said Silver Bell Copper Company; and because said Superior Court refused to hear such testimony or any thereof and erred in so doing.

And because the aforesaid provision in the judgment entered by the Superior Court is absolutely contrary to the findings and judgment of the District Court of Arizona upon the second trial of this case, as just hereinbefore quoted, and because said Steinfeld never claimed this money as his own and never misappropriated it, or any part of it, and because said provision in said judgment is inserted for the manifest purpose of charging Steinfeld unfairly and outrageously with interest upon said sum of \$25,750, amount-

427 ing to the enormous sum of \$14,613.11, and likewise for the purpose of enabling the attorneys for Zeckendorf to receive the additional amount of ten per cent of said sum of \$40,363.11, or the very large sum of \$4,036.31 as extra attorneys' fees upon an amount of money and interest which was never involved in this action and as to which Steinfeld could not upon any theory of law have ever been held liable to either Zeckendorf or the Silver Bell Copper Company.

Assignment of Error VI.

Receivership.

The court erred in denying defendant's motion to modify the judgment relating to the appointment and qualification and duties of the receiver and to discharge said receiver for the following reasons:

1. That it appeared upon said motion that the Silver Bell Copper Company had no debts, and that the sole and only stockholders thereof were the defendant Steinfeld and the plaintiff, and that the said corporation was not a going concern and owned no property except such money as might be found to be due it by reason of this action, and that full and complete justice might be done the plaintiff by directing the defendant Steinfeld to pay directly to the plain-

tiff L. Zeckendorf the amount of money that the court might decree to him.

428 2. That a trial court always has power to discharge a receiver even though the judgment appointing such receiver had been affirmed by the highest appellate court, and that the appointment of said receiver was unnecessary and without purpose and that it burdened both the plaintiff and the said defendant Steinfeld with the useless and unnecessary expense.

The above assignment of error needs no elaboration by way of argument. No person had any interest in the result or has any interest in the fund except Steinfeld and Zeckendorf, and as the fund consists wholly of a liquidated money judgment, Zeckendorf could be amply protected by a bond, and the receivership can serve no possible purpose except to increase the expenses of this litigation to both of the parties to this action.

A court of equity will look at the substance of things and not deal with shadows.

The motion of the Defendants should have been granted.

429 And on to-wit: the eighth day of December, 1913, being one of the regular judicial days of said Supreme Court, the following order, inter alia, was had and entered of record in said cause, in words and figures following, to-wit:

Title of Cause.

At this day, upon the affidavit of Mr. Eugene S. Ives, and motion of attorneys for the appellants, it is ordered that the appellants may have until and including the 31st day of December, 1913, within which to file their brief herein.

And on to-wit: the twenty-eighth day of February, 1914, there was filed in the Clerk's office of said Supreme Court in said entitled cause a certain Opinion of the Court, in words and figures following, to-wit:

430

In the Supreme Court of Arizona.

No. 1347.

LOUIS ZECKENDORF, Plaintiff-Appellee,
vs.ALBERT STEINFELD, R. K. SHELTON, J. N. CURTIS, SILVER BELL
Copper Company, a Corporation, and Mammoth Copper Com-
pany, a Corporation, Defendants-Appellants.Appeal from a Judgment of the Superior Court of the County of
Pima.

Fred Sutter, Judge.

Appeals Dismissed.

The facts are stated in the opinion.

Mr. Frank H. Hereford and Mr. Edwin A. Meserve, for appellees,
and Mr. S. M. Franklin, for Receiver.Mr. Francis J. Heney, Mr. Eugene S. Ives, and Mr. S. L. Kingan,
for appellants.

Ross, J.:

The history of this case may be found in 10 Ariz. 221, 86 Pac. 7, 11 Ariz. 192, 89 Pac. 496, 12 Ariz. 245, 100 Pac. 784, and 225 U. S. 445. It originated in the territorial days in the District Court of Pima County, where it was twice tried. Two appeals were prosecuted from judgments of the trial court to the Supreme Court of the Territory. From the last judgment of the latter court both parties appealed to the Supreme Court of the United States.

431 The "statement of the facts of the case in the nature of a special verdict" was made and certified to the United States Supreme Court by the territorial Supreme Court, as provided in section 702, volume 4, Fed. Stat. Annotated, 18 Stat. L. 27, of which statement the court, at page 448 of 225 U. S. Rep., said: "The Supreme Court of the Territory made elaborate findings of fact, adopting the findings of the District Court and making certain findings of its own. So far as necessary to determine the case as we view it, the findings may be summarized as follows: * * *

"That court further said, at page 449, "The findings of fact sent up to us, and which must alone be the basis of our judgment, show," etc.

The mandate from the Supreme Court of the United States is "that such execution and further proceedings be had in said cause in conformity with the opinion and judgment of this court as according to right and justice and the laws of the United States ought to be had the said appeals notwithstanding."

The opinion of the Supreme Court directs that "the case be remanded to the Supreme Court of the State of Arizona, as successor of the territorial Supreme Court, for such further proceedings as may not be inconsistent with the opinion of this court." This court remanded the case to the Superior Court of Pima County, Arizona, with directions "that such action be had in said cause as by
432 the mandate of said Supreme Court of the United States may be proper, said appeal notwithstanding."

The present appeal is from the judgment of the Superior Court of Pima County, entered upon the mandate above set forth. We are asked to dismiss the appeals on the ground and for the reason that the judgment appealed from is in accordance with and in strict conformity to the mandates of the Supreme Courts of the United States and the State of Arizona.

The appellants insist that under the terms of the mandates, it was the duty of the trial court to give them a new trial, that is to hear other and additional evidence on certain features of the case. The court took the view that under the mandates, it was powerless to open up the case as for a trial *de novo*, and proceeded to enter judgment upon the record as made and certified to the United States Supreme Court and in conformity with the decision of that court as contained in its opinion.

It seems to us that the court did the only thing it was authorized to do. We cannot construe the mandate as permitting or directing a new trial of the issues that were submitted to and decided by the Supreme Court. The court of first instance was as much bound by the findings of fact in entering its judgment, as the Supreme Court in determining the law questions presented to it.

433 The decisions are numerous to the effect that the findings of fact by the Supreme Court of a territory are conclusive and may not be reviewed on appeal to the Supreme Court of the United States. That court is limited to a review of questions of law only.

Eilers v. Boatman, 111 U. S. 356, 28 L. Ed. 454;

Idaho, etc., Land Imp. Co. v. Bradbury, 132 U. S. 509, 33 L. Ed. 435;

Zeckendorf v. Johnson, 123 U. S. 617, 31 L. Ed. 277;

Haws v. Victoria Copper Co., 160 U. S. 303, 40 L. Ed. 436;

Gildersleeve v. N. M. M. Co., 161 U. S. 573, 40 L. Ed. 812;

Bear Lake, etc., v. Garland, 164 U. S. 1, 41 L. Ed. 327;

Eagle M. & I. Co. v. Hamilton, 218 U. S. 513, 54 L. Ed. 1131.

It was said by the Circuit Court of Appeals in *Haley v. Kilpatrick*, 104 Fed. 647: "The law of the case was settled in the opinion of the court when the case was first here. It remains the law of the case in this court, the decree of the state court in another and different case to the contrary notwithstanding. *Mathews v. Bank*, 40 C. C. A. 444, 100 Fed. 393. It is well settled that a second appeal or writ of error in the same case only brings up for review the proceedings of the trial court subsequent to the mandate, and does not authorize a reconsideration of any question either of law or fact which was considered and determined on the first appeal or writ of error."

434 *Bridge Co. v. Stewart*, 3 How. 413, 425, 11 L. Ed. 658; *Sizer*

v. Many, 16 How. 98, 14 L. Ed. 861; Tyler v. Magwire, 17 Wall. 253, 283, 21 L. Ed. 576; Phelan v. City & County of San Francisco, 20 Cal. 39, 44; Leese v. Clark, Id. 388."

In re Potts, 166 U. S. 263, 41 L. Ed. 994, the court said: "When the merits of a case have been once decided by this court on appeal, the Circuit Court has no authority, without express leave of this court, to grant a new trial, a rehearing, or a review, or to permit new defenses on the merits to be introduced by amendment of the answer."

In re Sanford Fork & Tool Co., 160 U. S. 247, 40 L. Ed. 414, this language was used: "When a case has been once decided by this court on appeal and remanded to the Circuit Court, whatever was before this court and disposed of by its decree, is considered as finally settled."

In the opinion of Gaines v. Rugg, 148 U. S. 228, 239, the very language of the mandate in this case is discussed: "It is contended for the respondent that the decree of this court was one absolutely reversing the decree of the Circuit Court; that the Circuit Court has a right, therefore, to proceed in the case, in the language of the mandate, not merely 'in conformity with the opinion and decree of this court,' but also 'according to right and justice'; and that, 435 therefore, it had authority to permit the defendant Rugg to take further testimony in support of his exceptions, 'by way of defense to the title to the lands in controversy,' and to set down the cause 'upon the issues formed by the pleadings and exceptions aforesaid as to the title to said lands;' in other words, that the whole controversy was to be reopened as if it had never been passed upon by this court as to the title and possession of the land. This cannot be allowed, and is not in accordance with the opinion and mandate of this court."

The pleadings of the parties to this case presented squarely to the court for decision the question as to whether the property involved in the litigation belonged to the Silver Bell Company or to Steinfeld, and upon the findings of fact or "statement of the facts of the case" before it, the Supreme Court of the United States determined as question of law the issue against Steinfeld and in favor of the Silver Bell Company.

An inspection of the judgment appealed from discloses that it is in accordance with the opinion and judgment of the Supreme Court in that it is against Steinfeld and in favor of the Silver Bell Company for the amount of money and the property appropriated by Steinfeld to his own use, less certain allowances and credits given to Steinfeld 436 with the further general provision that the receiver for the Silver Bell Company shall pay to Steinfeld all sums of money heretofore necessarily paid by him for and on account of the Silver Bell Company after an account of same has been presented, audited and approved by the court.

The judgment also allows the Silver Bell Company interest at 6% per annum on the amounts recovered, from the date of the wrongful conversation of such sums by Steinfeld, and of this he complains. We think this was "according to right and justice and the laws of the

United States," and in conformity with the opinion of the Supreme Court.

In *United States v. North Carolina*, 136 U. S. 211, 222, 34 L. Ed. 336, 341, the court said: "Interest, when not stipulated for by contract, or authorized by statute, is allowed by the courts as damages for the detention of money or property, or of compensation, to which the plaintiff is entitled."

It is stated as a general principle in *Stewart v. Barnes*, 153 U. S. 456, 462, 38 L. Ed. 981-5: "Where money is retained by one man against the declared will of another who is entitled to receive it, and who is thus deprived of its use, the rule of courts in ordinary cases is, in suits brought for the recovery of the money, to allow interest as compensation to the creditors for such loss. Interest in such cases is considered as damages, and does not form the basis of the
437 action, but is an incident to the recovery of the principal debt."

The conclusion of the court was that Steinfeld had converted this large sum of money to his own use. Its rightful owner had been deprived of its use and the fruits thereof for some nine or ten years. It cannot be said that the lawful owner of property is fairly or reasonably compensated by an award of the return to him of his property or its value, without damages for its use and detention. As we understand it, the general rule, both at law and in equity, is that the owner is entitled to the return of his property or its value at the time of its wrongful conversion, together with damages which are usually estimated at the legal rate in the absence of a statutory rule. 22 Cyc. 1495, *Carper v. Hill*, 94 Fed. 582; *Brown v. First National Bank*, 49 Colo. 393, 113 Pac. 483.

Appellant complains specifically of interest being charged on an item of \$25,750.00, one of the sums sued for and found to belong to the Silver Bell Co. for the reason, as he asserts, he was holding it as garnishee in a suit against the Silver Bell Company by one Franklin. We think the judgment entered fully protects Steinfeld by providing that he may "render an account of all moneys legally and lawfully paid out by him by reason of a garnishment served upon
438 him in the case of S. M. Franklin vs. Silver Bell Copper Company," on which sum interest at six per cent. per annum shall be calculated from January 16, 1904, to date of settlement, and that execution issue for balance only.

The plaintiff-appellee was given judgment against the Silver Bell Company in an amount equal to ten per cent. of the total recovery as attorneys' fees for bringing and prosecuting the action to judgment. The court refused to hear evidence of the value of the services rendered by the attorneys upon the offer of appellant and proceeded to render judgment for 10% of amount recovered upon the theory that it was bound by a finding of the Territory Supreme Court, certified in its findings of fact to the United States Supreme Court, to the effect, "that ten per cent. of the amount for which judgment is finally given in this action is and will be a reasonable amount to be allowed plaintiff as a charge against said Silver Bell Copper

pany as attorney's fees for bringing and prosecuting this action to its benefit."

This finding of fact by the territorial Supreme Court was binding on the federal Supreme Court, at the hearing before it, and upon her appeal will be binding upon it. We think it was likewise binding upon the Superior Court.

The motion was made by appellants to discharge the receiver theretofore appointed by the District Court of Pima County. The disallowance of this motion is assigned as error. We think the answer to this assignment is found in this language of the Supreme Court: "It is contended that it was wrong to appoint a receiver in the case, but we think that, in view of the situation of the property and the final winding up of the company, the appointment of the receiver was proper, and that that officer should be continued until the final settlement of the affairs of the company."

Zeckendorf v. Steinfeld, 225 U. S. 445, 459.

The judgment against appellant Steinfeld is, in our opinion, in conformity with the opinion and judgment of the Supreme Court of the United States, as according to right and justice and the laws of the United States, and the motion to dismiss Steinfeld's appeal is denied.

Appellants Shelton, Curtis and Mammoth Copper Company were likewise affected by the judgment and the motion to dismiss the appeals as to them will be granted.

This action was prosecuted by appellee as a stockholder therein for the benefit of the Silver Bell Company and as a result thereof the company has been enriched to the amount recovered. The company can have no standing in this court as an appellant from that judgment. Right and justice require that the company protect the appellee against any costs that he may have incurred in the employment of attorneys or otherwise, and to that end judgment was entered in appellee's favor against the company and the receiver directed to pay the same out of the moneys recovered. The judgment in that respect is consistent with the opinion of the Supreme Court.

A close examination of the bonds on appeal makes it very difficult to determine that the Silver Bell Company considered itself aggrieved or injured by the judgment, for in the bonds on appeal it appears in the equivocal position of both obligor and obligee. These bonds are made to itself by itself. The officers of the company who executed these bonds are shown by the findings of fact to be under the control and domination of appellant Steinfeld. We recite these facts as bearing upon the motion by the receiver of the Silver Bell Company that the appeal, as to it, be dismissed. The receiver is not dissatisfied with the judgment, and appellant Steinfeld as a stockholder is not complaining, for he is as much benefitted as a stockholder as is the appellee. The attorneys who represent appellant Steinfeld also represent the Silver Bell Company. A termination of this litigation successfully to Steinfeld would lead to most disastrous results to the company. So we conclude that even though

ordinarily the receiver might not dismiss an appeal being prosecuted by the officers of a company, in the circumstances of this case,
441 the motion to dismiss should be granted.

The appeals should be dismissed and it is so ordered.

HENRY D. ROSS, *Judge*.

We concur:

ALFRED FRANKLIN,

Chief Justice.

D. L. CUNNINGHAM, *Judge*.

And on the same day, to-wit: the twenty-eighth day of February, 1914, being one of the regular juridical days of said Supreme Court, the following order and judgment, inter alia, was had and entered of record in said cause, in words and figures following, to-wit:

No. 1347.

ALBERT STEINFELD, R. K. SHELTON, J. N. CURTIS, HIRAM W. Fenner, Receiver of the Silver Bell Copper Company, a Corporation, and Mammoth Copper Company, a Corporation, Appellants,
vs.

LOUIS ZECKENDORF, Appellee.

The Motions to Dismiss the Appeals, filed herein by Louis Zeckendorf, appellee, and Hiram W. Fenner, Receiver of the Silver Bell Copper Company, a corporation, substituted in place of Silver Bell Copper Company, a corporation, having been heretofore submitted and by the Court taken under advisement, and the
442 Court having considered the same and being fully advised in the premises:

It is ordered that said motions be granted, and the appeals be, and the same are hereby, dismissed.

It is further ordered, adjudged and decreed that the appellee herein do have and recover of and from the appellants herein, his costs in this court, taxed at forty-two (\$42.00) dollars.

It is further ordered, adjudged and decreed that Hiram W. Fenner, Receiver of the Silver Bell Copper Company, do have and recover of and from Albert Steinfeld, R. K. Shelton, J. N. Curtis, and Mammoth Copper Company, appellants herein, his costs in this court, taxed at sixty-eight (\$68.00) dollars.

And on to-wit: the tenth day of March, 1914, being one of the regular juridical days of said Supreme Court, the following order, inter alia, was had and entered of record in said cause, in words and figures following, to-wit:

443

Title of Cause.

At this day, it is ordered that the Motion to recall the order of dismissal entered herein on the 28th day of February, 1914, and for leave to file supplem-ental abstract of record, filed herein by appellant, Albert Steinfeld, be and the same is hereby, denied.

And on to-wit: the sixteenth day of March, 1914, came the appellants by their attorneys and filed in the Clerk's office of said Supreme Court in said entitled cause, his certain Petition for Re-hearing, in words and figures following, to-wit:

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the State of Arizona:

The appellants in the above entitled cause respectfully petition this court to rehear the same and to reconsider its action and judgment dismissing their appeal, upon the following grounds, to-wit:

1. That the Superior Court erred in holding that it was not authorized to try the case *do novo*, for the reasons assigned in our brief heretofore filed and filed upon this motion, and that therefore, the appeal should not have been dismissed.

2. That the Superior Court erred in awarding interest, for the reasons assigned in our brief heretofore filed, and for the further reason that if the decision of the Supreme Court of the United States must be interpreted as being in effect a direction to the trial court to enter judgment in favor of Zeckendorf, then it follows that inasmuch as the Supreme Court of the United States did not direct the payment of interest to Zeckendorf, the Superior Court was without authority to go beyond the mandate and award interest.

In re Washington & G. R. R. Co., 140 U. S., 92;
Heimly v. Rose, 5 Cranch, 312.

3. That the Superior Court erred in that portion of the judgment relating to the moneys garnisheed in the action brought by Franklin against the Silver Bell Copper Company, for the reasons assigned in our brief heretofore filed and in our briefs filed herewith, and that therefore the appeal should not have been dismissed.

4. That the Superior Court erred in that portion of the judgment relating to attorneys' fees, for the reasons assigned in our brief heretofore filed and in our briefs filed herewith.

FRANCIS J. HENEY,

EUGENE S. IVES,

Attorneys for Appellants.

And on to-wit: the sixteenth day of March, 1914, being one of the regular juridical days of said Supreme Court, the following order, *inter alia*, was had and entered of record in said cause, in words and figures following, to-wit:

Title of Cause.

At this day, it is ordered that appellants' objections to Statement of Costs filed herein by appellee and Receiver, Hiram W. Fenner, be and the same are hereby overruled, and costs ordered taxed in accordance with the Statements filed by appellee and Receiver.

And on to-wit: the sixteenth day of April, 1914, being one of the regular juridical days of said Supreme Court, the following order, *inter alia*, was had and entered of record in said cause, in words and figures following, to-wit:

Title of Cause.

At this day, it is ordered that the Motion for Re-hearing filed herein by appellants be, and the same is hereby, denied.

446 And on to-wit: the thirtieth day of April, 1914, came the appellants, by their attorneys and filed in the Clerk's office of said Supreme Court in said entitled cause, their certain Application for, and Allowance of Appeal, in words and figures following, to-wit:

Title of Cause.

The above named appellants, Albert Steinfeld, R. K. Shelton, J. N. Curtis, Silver Bell Copper Company, a corporation, Mammoth Copper Company, a corporation, conceiving themselves aggrieved by the judgment of the Supreme Court of the State of Arizona made and entered on the 28th day of February, 1914, in favor of the above named appellee and Hiram W. Fenner, Receiver in said cause, and against the said appellants, do hereby appeal from the said judgment of the Supreme Court of the State of Arizona to the Supreme Court of the United States, which said judgment was made final by the denial of appellants' petition for a rehearing on the 16th day of April, 1914, and pray that their appeal be allowed and that a transcript of the record and proceedings in said cause duly authenticated, be sent to the Supreme Court of the United States.

Dated April 29, 1914.

EUGENE S. IVES,
FRANCIS J. HENEY,
Attorneys for said Appellants.

447 And now, on this 30th day of April, 1914, the appeal is allowed as above prayed, and the amount of the supersedeas bond on appeal is hereby fixed at the sum of \$600,000.00, Six hundred thousand dollars, and upon the filing of such supersedeas bond, approved by any Justice of the Supreme Court for the State of Arizona within sixty days from the day such judgment became final let all further proceedings upon said judgment be stayed until the determination of the said appeal.

ALFRED FRANKLIN,
Chief Justice, Supreme Court of Arizona.

And on the same day, to-wit: the thirtieth day of April, 1914, being one of the regular juridical days of said Supreme Court, the following order, inter alia, was had and entered of record in said cause, in words and figures following, to-wit:

Title of Cause.

Comes now Eugene S. Ives, Esq., for appellants herein, and presents to the Court their petition for allowance of appeal from the judgment of this Court to the Supreme Court of the United States, whereupon;

It is ordered by the Court that said petition be granted and
 448 the appeal be, and the same is hereby, allowed; and

It is further ordered that the amount of the Supersedeas Bond on appeal be fixed in the sum of Six Hundred Thousand (\$600,000.00) Dollars.

It is further ordered that the clerk of the Superior Court of Pima County return to this court the record in this cause.

And on to-wit: the sixteenth day of May, 1914, came the appellants, and filed in the Clerk's office of said Supreme Court in said entitled cause, their certain Supersedeas Bond, in words and figures following, to-wit:

Title of Cause.

Know all men by these presents: That we, Albert Steinfeld, R. K. Shelton, J. N. Curtis, Silver Bell Copper Company, a corporation and Mammoth Copper Company, a corporation, as principals in the full sum of this bond, and the following names as sureties, each in the sum set opposite his name,

Epes Randolph, Two Hundred Thousand Dollars,
 Leo Goldschmidt, Two Hundred Thousand Dollars,
 L. J. F. Jaeger, Two Hundred Thousand Dollars,

449 are held and firmly bound unto Louis Zeckendorf, appellee, the Silver Bell Copper Company, a corporation or Hiram W. Fenner, Receiver thereof, or either the said Zeckendorf or Silver Bell Copper Company or Receiver, in the full and just sum of Six hundred thousand dollars (\$600,000.00) to be paid to the said Louis Zeckendorf or the said Silver Bell Copper Company of the Receiver thereof, their executors, administrators, successors or assigns, to which payment well and truly to be made we bind ourselves, our heirs, successors, executors and administrators jointly and severally firmly by these presents.

Sealed with our seals and signed with our hands and dated this 14th day of May, 1914.

The condition of this bond is such that

Whereas, lately at a session of the Supreme Court of the State of Arizona in a suit depending in said court between Louis Zeckendorf, plaintiff and appellee, and Albert Steinfeld, J. N. Curtis, R. K. Shelton, Silver Bell Copper Company and Mammoth Copper Company, defendants and appellants, a judgment was rendered against the said appellants and in favor of the said appellee and of Hiram W. Fenner, Receiver appointed in said action, on the 28th day of February, 1914, in all things approving the judgment of the Superior Court of the State of Arizona therein appealed from and ordering that the appeals from said judgment be dismissed;
 450 and

Whereas, thereafter and within the time allowed by law said appellants filed their motion for a rehearing of said cause, which said motion was on the 16th day of April, 1914, denied, and said judgment of February 28th, 1914, thereby made final; and

Whereas, the said appellants have obtained the allowance of an appeal to the Supreme Court of the United States to reverse the said judgment of the Supreme Court of the State of Arizona in the aforesaid suit and a citation directed to said appellees, Louis Zeckendorf, and said Hiram W. Fenner, Receiver, citing and admonishing them to be and appear at the Supreme Court of the United States sixty days after the date of said citation.

Now, the condition of the above obligation is such that if the said appellants shall prosecute their said appeal to effect and answer all costs and damages if they fail to make their appeal good, then the above obligation to be void; otherwise to remain in full force and effect.

ALBERT STEINFELD.

J. N. CURTIS.

R. K. SHELTON.

SILVER BELL COPPER COMPANY,

By J. N. CURTIS, *President*;

R. K. SHELTON, *Secretary*.

MAMMOTH COPPER COMPANY,

By ALBERT STEINFELD, *President*;

ALFRED S. DONAU, *Secretary*.

EPES RANDOLPH.

LEO GOLDSCHMIDT.

L. J. F. IAEGER.

451

Approved as a supersedeas and cost bond by

ALFRED FRANKLIN,

*Chief Justice of the Supreme Court
of the State of Arizona.*

STATE OF ARIZONA,

County of Pima, ss:

Epes Randolph, being first duly sworn, doth depose and say; that he is one of the sureties named in and who executed the foregoing bond; that he is a resident and freeholder of the county of Pima, State of Arizona, and is worth the sum of \$200,000.00 specified in the foregoing bond over and above all his judt debts and liabilities and exclusive of property exempt by law or forced sale.

EPES RANDOLPH.

Subscribed and sworn to before be this 6th day of May, 1914.

My commission expires February 23, 1916.

[SEAL.]

W. F. ELLSWORTH,

Notary Public.

452

STATE OF ARIZONA,

County of Pima, ss:

Leo Goldschmidt, being first duly sworn, doth depose and say: that he is one of the sureties named in and who executed the foregoing bond; that he is a resident and freeholder of the county of Pima State of Arizona, and is worth the sum of \$200,000.00 specified

in the foregoing bond over and above all his just debts and liabilities and exclusive of property exempt by law or forced sale.

LEO GOLDSCHMIDT.

Subscribed and sworn to before me this 6th day of May, 1914.

My commission expires February 23, 1916.

[SEAL.]

W. F. ELLSWORTH,

Notary Public.

STATE OF ARIZONA,

County of Pima, ss:

L. J. F. Iaeger, being first duly sworn, doth depose and say; that he is one of the sureties named in and who executed the foregoing bond; that he is a resident and freeholder of the county of Pima, State of Arizona, and is worth the sum of \$200,000.00 specified in the foregoing bond over and above all his just debts and liabilities and exclusive of property exempt by law or forced sale.

L. J. F. IAEGER.

453 Subscribed and sworn to before me this 6th day of May, 1914.

My commission expires February 23, 1916.

[SEAL.]

W. F. ELLSWORTH,

Notary Public.

And on to-wit: the twenty-seventh day of May, 1914, came the appellants, by their attorneys and filed in the Clerk's office of said Supreme Court in said entitled cause, their certain Assignments of Error, in words and figures following, to-wit:

In the Supreme Court of the United States.

ALBERT STEINFELD, R. K. SHELTON, J. N. CURTIS, SILVER BELL Copper Company, a Corporation; Mammoth Copper Company, a Corporation, Appellants,

vs.

LOUIS ZECKENDORF and HIRAM W. FENNER, Receiver, Appellees.

Assignments of Error.

And now, to-wit: in the 25th day of May, 1914, before the Justices of the Supreme Court of the United States at the Capitol in the City of Washington, come the above named appellants by Eugene S. Ives, Francis J. Heney, and Samuel L. Kingan, their attorneys, and say that in the record and proceedings aforesaid there is manifest error committed by the Supreme Court of the State of Arizona, in this, to-wit:

I.

The Supreme Court of the State of Arizona erred in dismissing the appeal of the defendants-appellants from the judgment of the

Superior Court of the State of Arizona in and for Pima County, for the reason that the judgment of the Superior Court was appealable to the Supreme Court of the State of Arizona, and the said appeal was properly taken, and the Supreme Court of Arizona had jurisdiction over the subject matter and of the persons of all of the parties to the said action, and it was its duty to hear and determine the said appeal upon its merits.

II.

The Supreme Court of the State of Arizona erred in dismissing the said appeal of the defendants-appellants, for the reason that the said judgment of the Superior Court from which said appeal was taken not only provided that the plaintiff and the Silver Bell Copper Company, in whose behalf the plaintiff brought suit, had the right to recover the moneys alleged in the third amended complaint to have been misappropriated by the defendant Steinfeld, which was the sole matter considered by the Supreme Court of the United States in its opinion, but also provided for certain matters which were not treated or passed upon by the Supreme Court of the United States, to-wit, interest; the amount which should be allowed to plaintiff for his attorney's fees; and other amounts claimed to be due by Albert Steinfeld to the Silver Bell Copper Company by reason of certain moneys belonging to the Silver Bell Copper Company, which were held by Steinfeld by virtue of a writ of garnishment issued in a certain action brought against said Silver Bell Copper Company by one Selim M. Franklin, and also under an agreement between Steinfeld and the Silver Bell Copper Company, which is still in full force and effect, that he should so hold them, as was duly found by both the District Court of the Territory and the Supreme Court of the Territory.

III.

The Supreme Court of the State of Arizona erred in dismissing the said appeal, for the reason that the Superior Court erred in rendering judgment upon motion of the plaintiff, and in refusing and failing to proceed with a trial de novo upon the first cause of action in the third amended complaint set forth, for the following reasons:

(a) It was the duty of the said Superior Court, consistently with the opinion of the Supreme Court of the United States, and in accordance with right and justice and the laws of the United States, to proceed with a trial de novo upon the first cause of action.

456 (b) Even if it were not the duty of the Superior Court to proceed with a trial de novo, the Superior Court had the discretion to order a trial de novo, and it was its duty to examine into the record and ascertain therefrom whether upon a trial de novo a judgment might be rendered upon the first cause of action which would be consistent with the opinion of the Supreme Court of the United States, and which would be substantially a different judgment from that which the said Superior Court rendered upon motion of the plaintiff-appellee.

(c) It is manifest from the opinion of the Supreme Court of the United States that that court did not pass or purport to pass, upon any questions of fact, and did not examine into the evidence which was introduced upon the trial of the said first cause of action, and that it did not exercise, or pretend to exercise, jurisdiction to make or supply any missing material and essential finding of fact by inference, intendment, presumption or otherwise, from the Statement of the Case in the Nature of a Special Verdict which was before it, and to the facts within which it was limited by its own jurisdiction on appeal, or from any evidence that was either properly or improperly included or embodied or contained in said Statement, or otherwise or at all; but that said Supreme Court of the United States confined itself to the ascertainment of whether the facts in the nature of a special verdict certified to it by the Supreme Court of the Territory of Arizona were sufficient to sustain the judgment rendered by the said court, and therefore it became the duty of the said Superior Court to examine into the record with the view of ascertaining whether the facts found by the District Court and by the Supreme Court of the Territory of Arizona were all the facts essential and material to a determination of the rights of the parties to the end that it might order a trial de novo if it should appear that the said facts were not all the essential and material facts, or that additional evidence might be adduced as to the issues involved in the said first cause of action upon a trial de novo which would render necessary and just a judgment other than that rendered by the Superior Court.

(d) It appears by the record presented to the Superior Court that the Supreme Court of the Territory of Arizona certified to the Supreme Court of the United States upon the essential and material question as to the intent of the parties at the stockholders' meeting of the Silver Bell Copper Company held on the 26th of December, 1903, not an ultimate fact as to the intent of such parties, but a portion and a portion only of the evidence bearing upon such intent, which was actually heard and considered by that court at the trial; and that the Supreme Court of the United States assumed that such portion of the evidence was all the evidence bearing upon the question of the intent of the stockholders in voting at such stockholders' meeting, and upon such assumption (presumably for the sole purpose of illustrating its argument and opinion, and of showing the application of the principles of law laid down in its opinion) inferred from such portion of the evidence so certified to it the material and essential ultimate fact as to the intent of Albert Steinfeld in voting for the rescinding resolution at said stockholders' meeting, which the entire evidence that was heard and considered at the trial affirmatively and conclusively shows not to have been the intent of said Albert Steinfeld; and because the United States Supreme Court has repeatedly held, and did in its opinion in this case hold, that it could not and would not under its jurisdiction on such appeal, look into, weigh or consider the evidence, or any evidence, in the case, even if such evidence was contained or embodied in so-called findings of fact, or in a so-called Statement of the Case

in the Nature of a Special Verdict which had been certified to it upon such appeal, and that it would only apply the law to the material and essential ultimate facts as they were actually found and certified by the Supreme Court of the Territory in its Statement of the Case in the Nature of a Special Verdict, and that therefore justice
 459 required that the Superior Court of Arizona should examine into the whole of the evidence which was heard and considered by the trial court, and thus ascertain whether the fact which the Supreme Court of the United States inferred from a part only of the evidence on that point, for the purpose of argument and illustration merely, to-wit, from such part thereof as was contained in said Statement of the Case in the Nature of a Special Verdict, and upon which the Supreme Court of the United States subsequently based its decision, was affirmatively disproven by the whole of the evidence which was heard and considered by the trial court, and which was physically before the Supreme Court of the United States in the transcript on the first appeal, but was not, as a matter of law, before it for consideration under the character of jurisdiction that it was then avowedly exercising, and which, as a matter of fact, was not considered by it.

(e) The Superior Court refused to consider the objection of defendant Steinfeld to the entry of judgment in favor of Zeckendorf, upon the ground that there was no finding of fact as to the intent of the stockholders in voting in favor of the resolution to rescind the contract of May 20, 1903, for the reason that, in the opinion of said Superior Court, this question of intent was properly a conclusion of law, and not of fact. Notwithstanding that, this Court expressly
 460 and Specifically held to the contrary in its opinion in this case.

IV.

The Superior Court erred in rendering judgment upon the motion of the plaintiff-appellee; and therefore the Supreme Court erred in dismissing the said appeal for the reason that there was no finding by either the District Court of the Supreme Court of the Territory of Arizona, or any other court whatsoever, as to the intent of Albert Steinfeld in voting for the rescinding resolution at the said stockholders' meeting, and for the further reason that it appears by the record before the Superior Court that Albert Steinfeld had never had his day in court upon the question as to what was his intent in so voting. Upon the first trial the District Court held that the said Albert Steinfeld did not intend to vote to rescind the said resolution in toto. In appealing from the judgment rendered upon said first trial, the said Steinfeld assigned as error to the Supreme Court of the Territory of Arizona, and as the paramount error upon which he relied for a reversal, that the said finding as to his intent was not sustained by and was contrary to the evidence.

The Supreme Court of the Territory of Arizona, upon the first appeal, held that the intent of the said Steinfeld and of Zeckendorf in voting for the rescinding resolution was immaterial, and for this

reason it did not pass upon the said Steinfeld's assignment of
 461 error. Upon the second trial, the District Court tried the
 case upon the theory that it was bound by the decision of the
 Supreme Court of the Territory on this point, and that the question
 of the intent of Steinfeld and Zeckendorf, respectively, in voting in
 favor of said resolution of rescission, was not material, and the said
 Supreme Court, on the second appeal, followed its former decision on
 this point, and thus each and both of said courts deliberately and
 purposely refrained from making any finding of fact whatsoever
 either directly or indirectly, with respect to said intent on the part of
 Steinfeld, and from making any direct finding, or any specific or
 certain finding whatsoever, in regard to such intent on the part of
 Zeckendorf. The Supreme Court of the United States decided on
 appeal that the Supreme Court of the Territory committed error in
 holding that the intent of Steinfeld and Zeckendorf, respectively, in
 voting in favor of said resolution of rescission, was immaterial, and
 consequently it reversed the judgment of the Supreme Court of the
 Territory. Hence it is consistent with the opinion of the Supreme
 Court of the United States, and in accordance with law and justice
 that Steinfeld should have at and in a new trial the opportunity to es-
 tablish, and to have a court that can properly exercise jurisdiction to
 find facts from all the competent, relevant and material evidence
 in the case, make a finding of fact as to what was the true
 462 intent of each and all of the parties in voting in favor of said
 resolution of rescission at said stockholders' meeting. And
 this must be so, because the intent of Steinfeld and Zeckendorf in
 voting in favor of said resolution of rescission constitutes the gist of
 this action, for the reason that the right of Zeckendorf and the
 Silver Bell Copper Company to recover a judgment against Steinfeld
 on the first cause of action rests upon an allegation by plaintiffs that
 in voting in favor of the said resolution of rescission at said stock-
 holders' meeting, each and all of the parties thereto made a mutual
 mistake of fact. The answer of the defendants denies that any such
 mistake was made.

V.

The Superior Court of the State of Arizona erred, and therefore
 the Supreme Court of the State of Arizona, in dismissing the appeal
 of defendants, erred in awarding judgment against Steinfeld for the
 sum of \$25,750.00 that was held by Steinfeld at the time of and long
 prior to the commencement of this action, under and in pursuance
 of a writ of garnishment that was issued in an action brought by
 Selim M. Franklin against the Silver Bell Copper Company; and
 erred in awarding judgment against Steinfeld for interest amounting
 to \$14,098.11 upon said sum of money which was so garnisheed in
 the hands of Steinfeld, said interest being at the rate of six per
 463 cent per annum from the date of said garnishment to the
 date of said judgment; and erred in awarding judgment
 against Steinfeld for the sum of \$3,961.83, and in ordering said sum
 to be paid by the receiver of the Silver Bell Copper Company to the
 plaintiff Zeckendorf, as attorneys' fees, said sum being ten per cent

of said principal sum, together with interest thereon, that was so garnisheed, because and for the reason that Steinfeld never claimed to be holding said money, or any thereof, as his own, and because and for the reason that it was duly found and adjudged by the District Court and by the Supreme Court of the Territory that Steinfeld, at the time this action was commenced, was holding said money so garnisheed in his hands, and the whole thereof, in pursuance of his legal right and obligation so to do under said garnishment proceedings, as well as under and in pursuance of an agreement between Steinfeld and the Silver Bell Copper Company, and that said money should be held by him as security against said garnishment, and that after paying to said S. M. Franklin any moneys that might be recovered or for which he might get judgment in said garnishment proceedings, said Steinfeld would pay to the Silver Bell Copper Company the balance of said \$25,750.00 so left in his hands as security, after deducting the money so paid to said S. M. Franklin, and after deducting therefrom such sums, if any, as said Steinfeld may properly and in accordance with law have paid out for the benefit of the said Silver Bell Copper Company; and erred in awarding judgment for said amounts against Steinfeld, because and for the reason that the opinion and judgment of this court on the first appeal did not direct or authorize the entry of such judgment, and because and for the reason that there was no evidence before the Superior Court of Arizona, and no finding of fact by any court that the said garnishment proceedings were ended or completed, or that said agreement between Steinfeld and the Silver Bell Copper Company was ended, or that there was any balance due to the Silver Bell Copper Company under said agreement, and because and for the reason that Steinfeld offered, then and there at the time the motion for judgment herein was being considered by said court, to prove that a considerable part of said money had been paid out under said garnishment proceedings to said Selim M. Franklin under and in pursuance of a judgment duly rendered in his favor against said Silver Bell Copper Company, and against said Albert Steinfeld as such garnishee, and that all the remainder thereof had been duly and properly paid out by Albert Steinfeld in accordance with law and in pursuance of such judgment of the District Court, for the benefit of the said Silver Bell Copper Company.

VI.

465 The Superior Court of Arizona erred, and therefore the Supreme Court of the State of Arizona erred in dismissing the appeal of defendants, and in rendering judgment upon the motion of appellee for attorneys' fees, and in refusing to permit the defendants-appellants to offer evidence as to the reasonable value of the services of plaintiff's attorneys that were performed subsequent to the entry of judgment by the District Court of the Territory of Arizona upon the second trial of this action, and to offer evidence as to the character and amount of the benefit to the Silver Bell Copper Company, which accrued by reason of such service.

It appears from the record in these proceedings that all of the stockholders of the Silver Bell Copper Company, except the plaintiff Zeckendorf, assented to the payment to Steinfeld of the moneys alleged to have been misappropriated by him; and it further appears therefrom that Steinfeld, prior to the entry of judgment herein, had become the owner of all the stock of the Silver Bell Copper Company except 250 shares belonging to the said Zeckendorf, and that there were only 700 shares of stock in said Silver Bell Copper Company outstanding at the time of the commencement of this action; that said plaintiff Zeckendorf owned 250 shares thereof, the said defendant Steinfeld owned 280 shares thereof, and the said defendant Curtis

466 owned the remaining 170 shares thereof, and that said Curtis was, and for many years had been, a mere employe of said Zeckendorf and Steinfeld, and said Silver Bell Copper Company was organized merely as an agency of the firm of L. Zeckendorf & Company, composed of said Zeckendorf and Steinfeld, and for the purpose of operating or selling a certain group of mines, primarily, if not solely, for the purpose of paying off an indebtedness which was owing to the firm of L. Zeckendorf & Company from the party who was then operating said mines; and that therefore, the amount actually involved in this litigation was, as a matter of fact, not the amount of the judgment, but only that portion of the amount of such judgment which would be payable to Zeckendorf by reason of his ownership of 25/70 of the capital stock of said Silver Bell Copper Company; and it further appears from the record of the proceedings in this case that, prior to the entry of the judgment from which this appeal is taken, Steinfeld had acquired the ownership of the 170 shares of stock theretofore owned by said defendant Curtis, and that said Silver Bell Copper Company was not, at the time this action was commenced, or at the time said last mentioned judgment was entered indebted to any person other than said Steinfeld; and it further appears from the record of the proceedings in this case that said Superior Court of Arizona decreed, in and by its said judgment, that

467 the Silver Bell Copper Company, a corporation, should be dissolved, and that its entire assets, consisting of any proceeds from any judgment against Albert Steinfeld, should be distributed among its stockholders in proportion to the number of shares of stock owned by each of them, to-wit, 25/70 thereof to Zeckendorf, and 45/70 thereof to Steinfeld; and it further appears from the record of the proceedings in this case, that the actual amount in controversy between Zeckendorf and Steinfeld at the time of the commencement of this action did not exceed the sum of \$80,000.00, whereas it further appears that the amount of attorneys' fees already allowed to Zeckendorf, under the judgment entered by the Superior Court of Arizona, exceeds the sum of \$43,000.00.

And said Superior Court of Arizona erred, and therefore the Superior Court of the State of Arizona erred in adjudging that the plaintiff, out of the moneys recovered, or to be recovered, from Steinfeld, should have and recover of and from the Silver Bell Copper Company, and in adjudging that the receiver of the said Silver Bell Copper Company should pay to plaintiff, as additional attorneys' fees for

E. A. Meserve and Frank H. Hereford for bringing this action, and the prosecution of the same up to and including the entry of said judgment, the sum of \$39,618.38 with interest thereon from date until paid at the rate of six per cent per annum, for the following reasons:

1. There was no evidence before the Superior Court as to 468 the amount, nature, character or value of the services which were rendered by said attorneys in the Supreme Court of the Territory or in the Supreme Court of the United States subsequent to the second trial of this suit in the District Court of the Territory of Arizona, or even during the first trial thereof before said District Court.

2. The Superior Court erred in refusing to hear competent, pertinent, relevant and material evidence which was offered by Steinfeld to and before that court at the time plaintiff's motion for judgment was up for consideration upon the question as to the amount, nature, character and value of the services performed by the attorneys for Louis Zeckendorf in this suit in the Supreme Court of the Territory of Arizona and in the Supreme Court of the United States subsequent to the second trial of this suit in and before the District Court of the Territory of Arizona.

3. The amount of attorneys' fees allowed by the Superior Court is excessive, in that the court arrived thereat by using as a basis for its judgment a much larger sum than was actually involved in this litigation.

4. The District Court of the Territory of Arizona possessed no power, jurisdiction or authority to allow a contingent fee to the attorneys for Louis Zeckendorf, which should be determined as to 469 its amount solely or partially by the question of the amount for which any final judgment might thereafter be entered in the case; and the finding by the District Court of the Territory of Arizona upon the second trial of this case to the effect that ten per cent upon any judgment which might *be* thereafter be finally entered in the case would be a reasonable attorneys' fees, was not based upon any evidence then before said court, not upon any personal knowledge on the part of the judge thereof as to the amount, nature, character or value of the services which might thereafter be performed by the attorneys for Louis Zeckendorf, nor as to whether or not the case would be appealed to the Supreme Court of the United States, or even to the Supreme Court of the Territory by either party; and such so-called finding of fact was not within the issues made by the pleadings in the case, and was not appealable by Steinfeld, because said District Court of the Territory of Arizona rendered judgment in favor of Steinfeld upon said first cause of action upon said second trial, and rendered judgment in favor of Louis Zeckendorf and the Silver Bell Copper Company for the sum of \$2,600.00 only as and for attorneys' fees, for all legal services performed by said attorneys in this action up to and including the entry of judgment by said District Court in said action upon said second trial, and hence he has never had his day in court upon the aforesaid ten per cent finding.

470 5. The Superior Court erred in basing its allowance of attorneys' fees upon the first cause of action, solely upon the aforesaid so-called finding of fact which was so made by the District Court of the Territory of Arizona upon the second trial of this case, to the effect that ten per cent upon the amount of any final judgment which might thereafter be recovered in the case would be a reasonable attorneys' fee. Because the allowance for attorneys' fees must be for the reasonable value of the services actually performed by the attorneys, and the trial court must specifically ascertain and find the amount of such reasonable value from pertinent, relevant, material and competent evidence tending to prove the amount, nature, character and value of the services, or else from personal knowledge as judge on the part of the judge who tries the case, of the amount, nature, character and value of the services so already actually performed in the case by such attorneys at the time such finding of fact is made by such trial court.

6. The opinion and judgment of this court did not direct or authorize the entry of such a judgment for attorneys' fees.

7. The sum of \$3,961.83, which is a part of the aforesaid attorneys' fees, was allowed by the Superior Court of Arizona as ten per cent upon said principal sum of \$25,750.00 which was
471 found and adjudged to be held by said Steinfeld under garnishment proceedings at the time of the commencement of this action, as well as under an agreement between him and the Silver Bell Copper Company, that he would account only for any balance which might be in his hands after said garnishment proceedings were ended, and after deducting any sum or sums of money which he might properly have paid out for the benefit of said Silver Bell Copper Company, and ten per cent upon the sum of \$14,098.11, being the amount of interest adjudged by said Superior Court to be owing from said Steinfeld to said Silver Bell Copper Company, upon the aforesaid amount of money which was in his hands under said garnishment proceedings, for the time during which it was held under such garnishment proceedings.

8. The attorneys' fees ought to have been allowed to Zeckendorf only for the amount actually paid out by him for that purpose, or which he had obligated himself so to pay, or if no such was paid out, or such indebtedness incurred, then for the reasonable value of the services actually performed for the benefit of the Silver Bell Copper Company, and in reaching a determination on this last question, the Superior Court should have taken into consideration the fact that Zeckendorf, Steinfeld and Curtis were the only stockholders
472 at the time the action was commenced, and that Curtis was equally as guilty of wrongdoing as Steinfeld was, if Zeckendorf is entitled to recover in this action, and that consequently exact justice between the parties can only be done by treating the corporation as a mere agency or instrumentality of the parties, and by ignoring its existence, in determining the amount of attorneys' fees which it would be fair and equitable to allow to Zeckendorf.

VII.

The Superior Court of Arizona erred, and therefore the Supreme Court of the State of Arizona, by dismissing the appeal, erred in entering the judgment it did enter, because the Superior Court of Arizona did not judicially weigh or consider any of the facts or evidence in this action, and refused to exercise any judicial function whatsoever in the matter, and avowedly permitted Messrs. Meserve and Hereford, as attorneys for Zeckendorf, to prepare and have entered as the judgment of the court any judgment that they saw fit to prepare or to offer for entry, and because said attorneys did prepare the judgment that was entered by said court, and because said court did this, as stated by the judge thereof from the bench at the time said motion for judgment was allowed:

"It would take a great deal of research on the part of the court going into the case at this time and studying and reading over the record to dictate himself a proper form of judgment * * * and for that reason the court is led to rely largely upon the form of judgment submitted by counsel of the plaintiff. If they include anything in that form of judgment that should not be there, when it is brought to the attention of the Supreme Court of the United States, of course, it will be stricken out, or an order made back to this court to correct it and thereby they do not make anything. In fact, they lose if they are not careful to draw the judgment properly."

VIII.

The Superior Court erred in rendering judgment for interest upon the two principal sums of money, for the following reasons:

(a) The opinion and judgment of this court do not, either expressly or impliedly, direct or authorize the entry of such judgment, because they do not mention the subject of interest at all, and as that subject was not mentioned, in so far as the first cause of action is concerned, in either the findings or judgment of either the District Court of the Territory or the Supreme Court of the Territory, it must be presumed that this court did not intend and did not consider it equitable to allow it.

(b) Under paragraph 2774 of the Revised Statutes of Arizona, 1901, interest is not allowable upon moneys which have been misappropriated. The plaintiff, therefore, could only recover moneys in addition to the principal amount alleged to have been misappropriated, upon the allegation and proof that the Silver Bell Copper

Company had been damaged by the unlawful detention of such moneys by Steinfeld, and as there is no allegation whatever with respect to such special damages, and no proof and no finding of fact, the Superior Court was without power to render judgment for the same upon the motion of plaintiffs, or without trial or an opportunity upon the part of the defendants to offer proof in relation to the same.

(c) By virtue of the contract of May 20, 1903, Steinfeld was entitled to the custody of the funds until he should be relieved of

all of his obligations incurred in connection with the acquisition of the so-called English group of mines. Inasmuch as the claim of the plaintiff rests upon such resolution and upon the fact that the same was never rescinded it follows that Steinfeld was entitled to the custody of the said funds, and is therefore not responsible for damages for an alleged unlawful detention thereof.

IX.

The Supreme Court of the United States erred in dismissing the appeal from the judgment of the Superior Court insofar as it exceeded in amount the judgment of the District Court of July 30, 1908, on the second cause of action which had been affirmed by the Supreme Court of the Territory of Arizona and the Supreme Court of the United States for the reason that the said affirmance by the said courts of the judgment upon the said second cause of action was a final determination of the issues of said cause of action, and consequently no second judgment was necessary or proper not could the judgment so affirmed be increased in amount or otherwise disturbed.

X.

The Supreme Court of the State of Arizona erred in dismissing the appeal of the Silver Bell Copper Company from the order of the Superior Court refusing to discharge the receiver in said action, for the reason that it appeared upon said motion that the Silver Bell Copper Company had no debts and that the sole and only stockholders thereof were the defendant Steinfeld and the plaintiff Zeckendorf, and that the said corporation was not a going concern and owned no property except such money as might be found to be due it by reason of this action, and that full and complete justice might be done plaintiff by directing the defendant Steinfeld to pay to the said plaintiff Zeckendorf the amount of money the court might decree to him, and for the further reason that the trial court always has the power to discharge a receiver even though the judgment appointing such receiver has been affirmed by the highest appellate court and whenever it may appear that the said receiver is unnecessary and without purpose and burdens the parties to the action with useless and unnecessary expense.

Wherefore, the said Albert Steinfeld, R. K. Shelton, J. N. Curtis, Silver Bell Copper Company, a corporation, and Mammoth Copper Company, a corporation, appellants herein, pray that for the errors aforesaid and for other errors appearing in the record of the said Supreme Court of the State of Arizona in the above entitled cause to the prejudice of the appellants, the said judgment of the Supreme Court of Arizona be reversed, annulled and for naught esteemed, and that said cause be remanded to the Superior Court of the State of Arizona in and for the County of Pima, with instructions for granting a new trial in the said cause, and for such further

proceedings in said cause as may be determined by this Honorable Court, to the end that justice may be done in the premises.

FRANCIS J. HENEY,
EUGENE S. IVES,
S. L. KINGAN,
Attorneys for Appellants.

477 In the District Court of the First Judicial District of the Territory of Arizona in and for the County of Pima.

LOUIS ZECKENDORF, Plaintiff,

VS.

ALBERT STEINFELD, R. K. SHELTON, J. N. CURTIS, SILVER BELL Copper Company, a Corporation, and Mammoth Copper Company, a Corporation, Defendants.

Findings of Fact and Conclusions of Law.

478 This cause came on regularly for trial before the Court, Honorable John H. Campbell, Judge thereof presiding, sitting without a jury (a jury having been theretofore regularly waived by all parties) on the 16th day of May, 1905, all parties being present in person, and also by their attorneys; evidence oral and documentary having been regularly introduced and offered by the respective parties and received by the Court, the cause was in regular order and due course and form argued to the Court and submitted to it for its decision; after due consideration of the pleadings and of all admitted evidence in the case, and being fully advised in the premises the court now finds the following to be the facts in the case:

I.

That the defendant, the Silver Bell Copper Company, is now and for all the times herein mentioned has been a corporation organized, existing and doing business under and by virtue of the laws of the Territory of Arizona, with its principal place of business in the city of Tucson, County of Pima, in said Territory; that for all the

479 times herein mentioned, defendants Albert Steinfeld, J. N. Curtis and R. K. Shelton have been and now are the directors of said corporation, all of said parties being residents of said city of Tucson, County and Territory aforesaid.

That plaintiff for all of the times herein mentioned has been and now is a stockholder of said corporation, and he is now and for all of the times herein mentioned has been a resident of the city of New York, State of New York.

That the entire capital stock of said corporation was divided into one thousand shares, all of which said one thousand shares was originally issued by said corporation for value, in accordance with the laws of the said Territory of Arizona.

II.

That some time during the year 1900, the said Albert Steinfeld purchased 300 shares of said stock, theretofore belonging to one Carl Nielsen, from the said Carl Nielsen, and thereafter on the 13th day of January, 1901, a new certificate in lieu of the certificates purchased by the said Albert Steinfeld was issued for said 300 shares of stock to said Albert Steinfeld, the same being taken in his name as trustee. That on May 20th, 1903, said Albert Steinfeld held said

480 stock in his possession, and in his name as trustee for the Silver Bell Copper Company, and as the property of and for the benefit of said Silver Bell Copper Company, and said 300 shares of stock on the said 20th day of May, 1903, was, and ever since has been the property of said corporation.

That not deeming the same material, the court does not find on the issues raised by the pleadings as to the beneficiary ownership of said stock, prior to May 20th, 1903, because and for the reason that an agreement was entered into between said Albert Steinfeld and the said Silver Bell Copper Company on said 20th day of May, 1903, by which the beneficiary ownership of said stock was established in said Silver Bell Copper Company, and by which it was established that said Albert Steinfeld then and thereafter held the same in his name as trustee for said corporation and for its use and benefit, and as its property.

On said 20th day of May, 1903, and thereafter, the actual outstanding stock of said corporation was and has been 700 shares divided, owned and held as follows: By L. Zeckendorf and Company, 500 shares; by Albert Steinfeld, trustee for J. W. Zeckendorf, 30 shares; by J. N. Curtis, 170 shares. That of the 500 shares belonging to the said firm of L. Zeckendorf and Company, one share stood in the name of R. K. Shelton, the said R. K. Shelton at that time, however, having no interest nor ownership therein.

481 That the said R. K. Shelton, prior to the commencement of the trouble resulting in this litigation, and prior to the 9th day of December, 1903, in fact was but a stockholder in name only of the said one share of stock standing in his name, and said R. K. Shelton in fact had no interest therein; that said one share of stock, prior to the 6th day of June, 1903, was the property of the firm of L. Zeckendorf and Company, of which said Albert Steinfeld was at all times the active manager; That on the 6th day of June, 1903, the stock in the said Silver Bell Copper Company, belonging to said firm was divided by Albert Steinfeld between Louis Zeckendorf and Albert Steinfeld, one half to each, said Albert Steinfeld taking over the ownership as part of the stock coming to him, the said one share so standing in the name of said R. K. Shelton, and such condition thereafter continued until the 9th day of December, 1903, when said Albert Steinfeld, without any consideration whatsoever, but as a free gift, presented said one share of stock to said R. K. Shelton, that said R. K. Shelton for the first time being then put in possession of the certificate for said one share of stock; that the said R. K. Shelton never had any other or different interest in said Silver Bell Copper Company.

III.

That the said Mammoth Copper Company is now and for
482 all the times herein mentioned has been a corporation or-
ganized and existing under the laws of the Territory of
Arizona, having its principal place of business at Tucson, Pima
County, said Territory; that the defendant, Albert Steinfeld, is now
and for all the times herein mentioned, has been the owner in fact
of all of the capital stock of said Mammoth Copper Company; that
any stock standing in the name of any other party in order to en-
able him to qualify as a director is simply held by the said party for
that purpose, and the same belongs to and is in fact the property
of the said Albert Steinfeld, and the said Mammoth Copper Com-
pany is, and at all times was, but an instrument in the hands of
the defendant Albert Steinfeld, used by him for the purpose of trans-
acting business for himself not in his own name; that any money
which may, on its face, have been paid to the defendant Alber-
Steinfeld, and any property which may, on its face, have been de-
livered to the said Albert Steinfeld as hereinafter found, for the
benefit of the said Albert Steinfeld and the said Mammoth Copper
Company, jointly, in fact and in truth, were paid and delivered to
the said Albert Steinfeld and were appropriated by him, to his own
individual use.

IV.

That the said R. K. Shelton at all times since the 6th day of
June, 1903, and at all meetings of said stockholders of
483 directors of said Silver Bell Copper Company held after that
date, and particularly as a director of said corporation, has
voted as ordered, directed and requested by said Albert Steinfeld
and not otherwise, and at all of said times, as such director, has been
under the direction and control of said Albert Steinfeld, and at all
times subsequent to the 6th day of June, 1903, said R. K. Shelton
has been the representative of the said Albert Steinfeld on the board
of directors of said Silver Bell Copper Company, having no in-
terest in said corporation but to carry out and perform the wishes
and directions of said Albert Steinfeld; that the said Albert Stein-
feld, at all of the times herein mentioned after June 6th, 1903, was
in fact, by reason of his control of the other two members of the
said board, in absolute control and direction of the board of directors
of the said defendant corporation, and all acts, things and votes
taken by said board since said 6th day of June, 1903, and up to and
including the present time, were taken by and under the direction
of the said Albert Steinfeld and at his request and not otherwise,
and all votes, motions, resolutions and other acts of said board
adopted, passed or done by it, subsequent to said 6th day of June
1903, were done by and under the direction of and control of the
said Albert Steinfeld, and not otherwise.

V.

That because of the facts herein found, it would have been
484 an idle and useless act for this plaintiff to make any demand
whatsoever on the said board of directors to bring any ac-

tion against the said Albert Steinfeld, the said J. N. Curtis or the said R. K. Shelton for the recovery of property belonging to the said corporation, or for the payment to said corporation of any debt owing by said parties, or either of them, and particularly by the said Albert Steinfeld, to the said corporation, and that any such action, if brought in the name of said corporation, would not have been prosecuted in good faith, or with the full intent and purpose that the full recovery should be had thereon for the benefit of said corporation, and of this plaintiff, as a stockholder thereof; and for such reasons and because of such facts and because it would have been idle and purposeless to do so, this plaintiff made no demand whatsoever on said corporation that it bring this action or that it prosecute the same; and this plaintiff brought this action as a stockholder of said defendant corporation for its use and benefit and the benefit of its stockholders, and in order that its property, illegally taken from it, as hereinafter set forth, may be recovered and restored to its assets.

VI.

That under date of 20th day of May, 1903, all of the properties listed and described in the schedule marked "Exhibit A" attached to plaintiff's complaint and amended complaint on file herein, were sold to the Imperial Copper Company for the purchase price of \$515,000.00. That the Silver Bell Copper Company, Albert Steinfeld and the Mammoth Copper Company joined in the deed of conveyance of said properties: That said purchase price of \$515,000.00 under the terms of the sale thereof, became payable as follows, to-wit: \$115,000.00 in cash on said 20th day of May, 1903, and \$400,000 in four equal payments of \$100,000 each, due respectively in three, six, nine and twelve months after said 20th day of May, 1903, each of said payments being represented by a promissory note executed by the Imperial Copper Company for \$100,000.00 principal, to the order of, and payable to the said Silver Bell Copper Company, each of said notes being dated the said 20th day of May, 1903, and bearing interest from said the said date to the date of payment thereof, at the rate of six (6) per cent. per annum; that the sum of \$115,000.00 in cash was paid by said Imperial Copper Company to and received by said Albert Steinfeld, as the treasurer of the said Silver Bell Copper Company; that the said four promissory notes, each for \$100,000.00 principal, as aforesaid, were delivered to and received by the said Albert Steinfeld, as treasurer of the said Silver Bell Copper Company.

486

VII.

That on the said 20th day of May, 1903, after the said sale was completed, the said Silver Bell Copper Company, Albert Steinfeld and the Mammoth Copper Company, executed an agreement in writing, in the words and figures following, to-wit:

"This agreement, made this 20th day of May, 1903, between the Silver Bell Copper Company, a corporation organized and existing

under the laws of the Territory of Arizona, party of the first part, and the Mammoth Copper Company, a corporation organized and existing under the laws of the Territory of Arizona, party of the second part, and Albert Steinfeld, of Tucson, party of the third part, witnesseth:

"Whereas, the parties hereto have this day agreed to sell certain mining claims and property of the Imperial Copper Company, a corporation, as per written agreements heretofore made, and deeds for which property are now in escrow with the Phoenix National Bank, of Phoenix, Ariz.; and

"Whereas, the parties hereto desire to settle and determine as between themselves, what disposition shall be made of the proceeds of said sale; and

Whereas, the said Albert Steinfeld has assumed certain obligations with the said Imperial Copper Company, as more fully appears in the various agreements heretofore entered into by him in making such sale, and particularly in a certain Guarantee Agreement, wherein, amongst other things, said Steinfeld guarantees the title to certain mining claims so sold or agreed to be sold, and the parties of the first and second part desire to indemnify him against loss by reason of any of the said matters or things so done by him.

Now therefore, in consideration of the premises, and of the sum of One Dollar (\$1.00) by each of the parties hereto to the other in hand paid, receipt whereof is hereby acknowledged, it is hereby mutually agreed that the purchase price paid and to be paid upon the sale, shall belong to and be the property of the said Silver Bell Copper Company.

And it is further agreed that the four promissory notes of One Hundred Thousand Dollars (\$100,000.00) each, this day executed by the Imperial Copper Company to the Silver Bell Copper Company, upon said sale, as well as the proceeds of said promissory notes when collected, shall be held by the said Albert Steinfeld as trustee, and as security for, and indemnity against loss, damage or expense which may arise to him for or out of, or by reason of any
488 and all obligations and liabilities which he has assumed with the said Imperial Copper Company, or any other person whatsoever.

And it is further agreed that no dividend shall be declared by the said Silver Bell Copper Company until the stockholders of said company shall first have fully indemnified said Albert Steinfeld against loss, which might arise to him in the future, from or on account of any such obligations or liabilities so assumed by him.

In witness whereof, the said corporations, parties of the first and second part, has caused these presents to be signed by its President and Secretary, and its corporate seal to be hereunto affixed by resolution of its board of directors, and the said Albert Steinfeld has hereunto placed his hand and seal the day and year first above written. In triplicate."

That the terms of this agreement, and that it should be executed, were, however, all agreed upon before the said sale was completed,

or said money was paid, or said notes executed by the said Imperial Copper Company.

VIII.

The court does not find on the issues raised by the pleadings as to the ownership, legal or equitable, prior to said sale thereof, of the several properties described and listed in said schedule marked "Exhibit A," attached to the plaintiff's complaint and amended complaint on file herein, for the reason that the aforesaid agreement, dated May 20, 1903, in finding VII set out, established the ownership of the entire purchase price of the said property, cash and notes, to be in the said Silver Bell Copper Company. From and after the 20th day of May, 1903, the said Silver Bell Copper Company continued to be the owner of the whole of said purchase price, viz: Said sum of \$115,000.00 paid in cash by said Imperial Copper Company, and said four promissory notes for \$100,000.00 each except as the same was thereafter legally disbursed and paid out as hereinafter found.

IX.

That after the said 20th day of May, 1903, and prior to the first day of January, 1904, said Imperial Copper Company, paid two of said promissory notes, paying the principal thereof, with the interest at said rate of six per cent per annum on said principal up to the respective dates of payment, making a total of the cash paid to the said Silver Bell Copper Company, by said Imperial Copper Company, prior to January 1st, 1904, for and on account of said purchase and sale of said properties so listed and scheduled in said "Exhibit A" of the sum of \$319,487.50; that the said sums of money aggregating the said sum of \$319,487.50, were received by the said Silver Bell Copper Company from the Imperial Copper Company, as and for the first cash payment, and as the payments of the two promissory notes first falling due on the purchase price of said sale so made to said Imperial Copper Company. That of said sum there was regularly paid out for and on account of certain debts and contracts of the Silver Bell Copper Company, a total of \$118,000.00, including the sum of \$18,117.00 paid to Albert Steinfeld May 21st, 1903.

X.

That on the 26th day of December, 1903, a meeting of the stockholders of the defendant corporation was duly had; all of the stock of the defendant corporation was represented at such meeting, the said Zeckendorf being present in person and being furthermore represented by his attorney, also there in person.

At said meeting a resolution was offered, as follows:

"Resolved: That the agreement executed on May 20th, by the President and Secretary of the corporation with the Mammoth Copper Company and Albert Steinfeld, a copy of which is hereto an-

491 nexed, be and the same hereby is, rescinded, and that the said agreement and the resolution of the directors passed on said day be declared null and void."

(Copy of said agreement of May 20, 1903, above set out, was attached to said resolution.)

The said resolution was unanimously passed, all of the stock of said corporation voting in favor thereof, the said Zeckendorf in person voting 250 shares of the stock of the said corporation in favor of the said resolution.

Said resolution so passed at said stockholders' meeting was not procured by false representation, misconduct or fraudulent practices, but it was manifest to the directors of said corporation and it is a fact that neither the said Zeckendorf nor any other stockholder present in voting for said resolution intended to advise, direct, consent or assent, to a rescission of any part of the said agreement of date May 20, 1903, or of any other agreement or resolution, whereby the said Silver Bell Copper Company became, or might have become, the owner of the entire purchase price of the said properties conveyed to the Imperial Copper Company. All of said stockholders of said company understood that the entire controversy, then existing, was with respect alone to the right to the custody of the said purchase price (cash and notes) and that no question of ownership therein or thereof was involved or being raised.

XI.

That on the said 26th day of December, 1903, after the adjournment of said stockholders' meeting, defendant Shelton, Steinfeld and Curtis held a meeting as a board of directors of said Silver Bell Copper Company, at which meeting the following resolution was adopted, viz:

"Be it resolved:

1. That the said resolutions passed by the directors on the said 20th day of May, 1903, be and the same are hereby rescinded and repealed.

2. That the said agreement heretofore recited in full, be rescinded and declared null and void.

3. That the president and treasurer of this company be empowered to receive from the said Steinfeld and from the Bank of California all of the said funds and the two said notes of the Imperial Copper Company, which have not yet matured and to give his proper receipt therefor.

4. That the officers of this company be instructed to execute forthwith and deliver to the said Steinfeld and the Mammoth Copper Company an agreement rescinding the said agreement ab initio; and to do and cause to be done all such things and acts as may be necessary to accomplish and consummate the full rescission of said agreement, and that J. N. Curtis, the president and treasurer of the company be instructed to demand and receive from the Bank of California the said money and notes now held by the said Bank."

That in adopting said resolution neither said board nor any member thereof intended to cancel, rescind or annul any act, agreement or resolution under or by virtue of which the ownership of said entire purchase price of said properties sold to said Imperial Copper Company became fixed in said Silver Bell Copper Company, but said board and the several members thereof intended only by said resolution to provide that the custody of said notes and money should be placed in the treasury of the said Silver Bell Copper Company; That all actions and purported actions by the stockholders or directors of the said Silver Bell Copper Company taken on said 26th day of December, 1903, had reference alone to the custody and not to the ownership of said money, notes and funds.

XII.

That thereafter, and without further action whatsoever by the said Silver Bell Copper Company, and without any stockholder of the said company, other than said Curtis, Steinfeld and Shelton having any knowledge whatever thereof, or of such intended action the said Steinfeld, Shelton and Curtis, on the 16th day of January, 1904, purporting to act as a board of directors of said corporation, purported to adopt and pass a resolution, and caused the same to be spread upon the minute book of the said corporation, wherein and whereby the said parties so acting as aforesaid recited the fact that said Albert Steinfeld and the said Mammoth Copper Company claimed that their interests in the properties, conveyed as heretofore set out to the said Imperial Copper Company, were of greater value than were the interests of the said Silver Bell Copper Company therein, and that the said Albert Steinfeld and the said Mammoth Copper Company (of which the said Albert Steinfeld was the sole stockholder) claimed that they were entitled to more than one half of the said purchase price of \$515,000.00 so received by the Silver Bell Copper Company from the said Imperial Copper Company, and thereupon the said Steinfeld, Curtis and Shelton at said purported meeting, and purporting to act as the board of directors of said corporation, and as an act prepared by said Albert Steinfeld and at his request and on his direction, further resolved that the said Silver Bell Copper Company should pay to the said Albert Steinfeld personally and for his own individual use and benefit one half of the cash already received, less one half of the sum of \$28,000.00 theretofore paid by the said Silver Bell Copper Company, as commission and expenses in connection with the making of said sale, and that the said Silver Bell Copper Company should also at the same time, deliver to the said Albert Steinfeld, one of the two of the said promissory notes belonging to said corporation, still remaining unpaid, and in the hands of the corporation; That thereupon, on said 16th day of January, 1904, said J. N. Curtis, as and being then the treasurer of the said Silver Bell Copper Company, having in his possession the cash and the said two notes remaining unpaid, and under no other authority or claim of authority than as hereinabove in this finding set out, paid to the said Albert Steinfeld of the said funds of the said Silver Bell Copper

Company, then in the hands of said Curtis as the treasurer of said company, the sum of \$145,743.75 in cash (the same being one half of the said sum of \$319,487.50 less the said sum of \$28,000.00) and delivered to said Albert Steinfeld one of the said two notes then remaining unpaid, and which said money and note said Steinfeld received from said Curtis, treasurer of said Silver Bell Copper Company.

The said note so delivered to said Steinfeld at the time of such delivery was worth the full face value thereof, viz: the sum of \$104,000.00, and which said sum said Steinfeld received and collected on said note.

496 That said Steinfeld on said 16th day of January, 1904, converted said sum of \$145,743.75 and said note to his own personal use and benefit, and not to or for the use or benefit of any other person, firm or corporation. That said Steinfeld, after collecting and receiving on said note the said sum of \$104,000.00 prior to the commencement of this action, converted the said sum to his own use and benefit: That said Steinfeld has not paid back to the said Silver Bell Copper Company or to any other person for it any part of either of said sums or of the interest thereon, nor has the same or any part thereof ever been paid to said corporation or for it by any person whatsoever, but the whole of both of said sums with the interest thereon remain unpaid.

XIII.

That the said board of directors of said Silver Bell Copper Company subsequent to the 10th day of January 1904, and prior to the 20th day of January, 1904, sold the other of said two promissory notes remaining unpaid, receiving thereon on account of the principal and interest thereof, a total of \$103,967.00, which said sum was paid into the treasury of the said Silver Bell Copper Company.

497

XIV.

That on the 20th day of January, 1904, the directors of the said Silver Bell Copper Company passed a resolution, declaring a dividend of \$111.00 per share on the capital stock of said Silver Bell Copper Company. Said Albert Steinfeld thereupon collected and received from the treasurer of said corporation the sum of \$111.00 per share as such dividend on the 300 shares of stock belonging to said Silver Bell Copper Company, standing in his name as trustee, as aforesaid, receiving as such dividend on said stock the sum of \$33,300.00, and which said sum the said Albert Steinfeld thereupon converted to his own use and benefit and not to the use or benefit of any other person or corporation whatever, and the same has not, nor has any part thereof, been paid to or for the Silver Bell Copper Company, but the whole thereof with interest from the 20th day of January, 1904, at the rate of 6 per cent. per annum remains unpaid. That the said dividend of \$111.00 per share on said 300 shares was paid to the said Albert Steinfeld because of and on account of his control of said corporation.. That said money received by said Albert Steinfeld as such dividend on said 300 shares of stock was the money and prop-

erty of said Silver Bell Copper Company, and said Albert Steinfeld had no right thereto, and had no right to receive the same and
 498 convert the same to his own use. That said dividnd (except as to said 300 shares of stock standing in the name of Albert Steinfeld as trustee) was regularly declared; That R. K. Shelton was paid and received the sum of \$111.00 on such dividend, being the dividend on the one share of stock standing in his name; That said J. N. Curtis was paid and received the sum of \$18,870.00, being the dividend on 170 shares standing in his name; That said Albert Steinfeld in addition to said \$33,300.00 was paid and received the sum of \$27,639.00, being the dividend on the 249 shares standing in his name and belonging to him. That plaintiff has now been paid and has received the sum of \$27,750.00, being the dividend on 250 shares.

XV.

That after the 21st day of May, 1903, and some time in the month of May or June, 1903, S. M. Franklin, claiming to be a creditor of the said Silver Bell Copper Company, brought an action against the said Silver Bell Copper Company, for the sum of \$51,500.00, and in said action garnisheed the sum of \$51,500.00, for property of the said Silver Bell Copper Company, then in the hands of said Albert Steinfeld. The said action is entitled "S. M. Franklin, plaintiff, vs. Silver Bell Copper Company," Defendant," and
 499 was brought in this Court. That after said garnishment was levied on said Albert Steinfeld, and some time in the month of January, 1904, said Albert Steinfeld paid back to the Silver Bell Copper Company \$25,750.00 of said \$51,500.00, in his hands retaining the other \$25,750.00 as security against the said garnishment under an agreement with the said Silver Bell Copper Company that he would hold and retain said \$25,750.00 in his hands as such security against said garnishment, and that after paying to said S. M. Franklin any moneys that might be recovered, or for which he might get judgment in said action, he would pay to the Silver Bell Copper Company the balance of said \$25,750.00, so left in his hands as security, after deducting the money so paid to said S. M. Franklin.

The said Albert Steinfeld thereafter continued to hold and now holds said sum of \$25,750.00 as such security, the same being the property of the said Silver Bell Copper Company.

XVI.

On the 26th day of December, 1903, and prior to the said stockholders' meeting, the said Steinfeld turned over to the said J. N. Curtis, treasurer of the said Silver Bell Copper Company, all funds in his hands belonging to the said company except the sum of
 500 \$51,500.00 which had been garnisheed in his hands in a suit pending against the said company, instituted by one Selim M. Franklin, and except certain money and two promissory notes which had been deposited by him with the Bank of California in suits instituted by Louis Zeckendorf, and at the same time the said Steinfeld delivered to the said treasurer of the said corporation an order upon

the Bank of California authorizing and requiring the said Bank to deliver to the said corporation or its duly authorized officer the said money and notes so deposited by him as aforesaid, and the same were, after December 26th, 1903, and prior to January 10th, 1904, delivered and turned over by said bank to the said treasurer of the said Silver Bell Copper Company, with the knowledge, assistance and consent of said Albert Steinfeld.

XVII.

That on the 9th day of January, 1904, said Albert Steinfeld paid to Francis and Volkert the sum of \$12,700.00, for the benefit of said Silver Bell Copper Company. That on the 23rd day of January, 1904, said Albert Steinfeld paid to Mary Neilsen the sum of \$10,000.00, for the benefit of the said Silver Bell Copper Company. That on the 26th day of December, 1903, after the adjournment of the stockholders' and directors' meetings held on said day, said Albert Steinfeld paid to J. N. Curtis, treasurer of the said Silver Bell Copper Company, the sum of \$18,117.00.

501 That said Albert Steinfeld is entitled to a credit of said sums on the amounts above found to be wrongfully taken by him from said corporation on the 16th day of January, 1905.

XVIII.

That the sum of \$15,000.00 is a reasonable sum to be allowed plaintiff out of the funds recovered as the result of this action, by the said Silver Bell Copper Company, as and for attorneys' fees for the bringing of this action, and the prosecution of the same up to and including the entry of judgment thereon.

As conclusions of law from the foregoing facts, the court finds and concludes as follows, to-wit:

That Louis Zeckendorf, the plaintiff in the above entitled action, is entitled to judgment against defendants in said action.

First. That at no time after May 21st, was the Silver Bell Copper Company indebted to Albert Steinfeld or to the Mammoth Copper Company in any sum whatever, and that neither on the 10th, 16th or 20th day of January, 1904, or at any time between or subsequent to said dates, did either the said Albert Steinfeld, or the said Mammoth Copper Company, have any demand whatsoever against the said Silver Bell Copper Company or any claim against the said Silver Bell Copper Company, except as to and for the \$12,700.00 paid to Volkert and Francis; \$10,000.00 paid to Mary Neilsen, and the \$18,117.00 paid to the said J. N. Curtis, treasurer, as in finding 17, above stated.

Second. That the defendant Albert Steinfeld pay to the defendant the Silver Bell Copper Company, and that said Silver Bell Copper Company do have and recover of and from the said Albert Steinfeld the sum of \$266,450.15, with interest thereon from the 16th day of September, 1905, at the rate of six per cent per annum, and that said plaintiff do have execution for the said sum of \$270,531.15,

and such interest thereon from said date, against the said
503 Albert Steinfeld, the recoveries thereon to be paid to the defendant, the Silver Bell Copper Company, or to the receiver of the said company to be appointed, as hereinafter provided.

Third. That the plaintiff do have and recover of and from defendant Albert Steinfeld his plaintiff's costs in this action herein taxed in the sum of \$— and that plaintiff do have execution in his favor and against said defendant therefor.

Fourth. That plaintiff out of the said money recovered and to be recovered by the said Silver Bell Copper Company from said Albert Steinfeld, do have and be paid the sum of \$15,000.00 as an allowance for and as attorneys' fees for the bringing of this action and the prosecution of the same up to and including the entry of judgment hereon; the receiver hereinafter named and hereinafter appointed is hereby instructed to pay said sum of \$15,000.00 out of said money to said plaintiff in case of appeal or new trial of this action plaintiff to be allowed such other and further sum or sums as and for attorneys' fees as may hereafter be fixed.

Fifth. That Albert Steinfeld holds the sum of \$25,750.00 money of said Silver Bell Copper Company, in his hands and for the security to him against any liability on account of the garnishment levied on him as aforesaid in said action of Franklin vs. Silver Bell
504 Copper Company; said Steinfeld to account to the said receiver of the said corporation hereafter appointed, for said sum immediately upon the final determination and settlement of said action; and to pay to the said receiver any balance of said sum there may be left remaining after deducting therefrom such sums if any that said Steinfeld may pay or may have paid said Franklin on account of said garnishment, in the event that Franklin should recover in the said action.

Sixth. That a receiver be appointed in this action by this Court of all property, money, books, papers and assets of every kind and character of said Silver Bell Copper Company; said receiver upon being appointed and qualifying, to take immediate possession of all money, property, books, papers and other assets of said Silver Bell Copper Company and to pay, distribute and disburse the same as this court herein and from time to time hereafter may order and direct; Hiram W. Fenner to be appointed such receiver and to give and execute a bond in the sum of \$275,000.00 in the usual form of receiver's bonds, to be approved by this court for the faithful performance of his duties as such receiver.

Seventh. That upon the final termination of this action said Silver Bell Copper Company be dissolved, all its debts and liabilities
505 paid and discharged, and all property, money and assets then remaining shall be distributed among its stockholders in the proportions of their several ownership of stock, the same to be done and accomplished by order of this Court for that purpose hereafter made and to be made in this action.

Let judgment be entered accordingly.

Dated this 16th day of September, 1905.

JOHN H. CAMPBELL, *Judge*.

Filed Oct. 21, 1905.

Judgment.

[Title of Cause.]

Be it remembered That the above entitled cause came on regularly for trial on the 16th day of May, 1905, before the Court, sitting without a jury, Honorable John H. Campbell, presiding. Plaintiff appeared by his attorneys, Edwin A. Meserve, Esq., and Messrs. Hereford & Hazzard; defendants appeared by their attorneys Eugene S. Ives, Esq., and Francis J. Heney, Esq. Witnesses were duly sworn on behalf of plaintiff and on behalf of defendants and gave their testimony and documentary evidence on behalf of the respective parties was received by the Court, and the evidence being closed, the case was argued by the counsel and submitted to the Court for its consideration and decision; and the Court having duly considered the same and being fully advised in the premises, filed his decisions in writing, herein, dated the 16th day of September, 1905, wherein the Findings of Fact and Conclusions of Law are separately stated and wherein the Court finds that the plaintiff is entitled to judgment against the defendant in accordance with the conclusions of law as therein set forth.

Wherefore by virtue of the law and the premises aforesaid, it is hereby ordered, adjudged and decreed and this Court does hereby order adjudge and decree:

First. That Albert Steinfeld, the defendant, in the above entitled action, pay to the defendant, the Silver Bell Copper Company, and that the said Silver Bell Copper Company, do have and recover from the said Albert Steinfeld the sum of \$266,450.15, with interest thereon at the rate of 6 per cent. per annum from the 16th day of September, 1905. That said plaintiff do have execution for the said sum of \$266,450.15, and interest thereon from said date, against the said Albert Steinfeld, the recoveries on said execution, to be paid to the defendant, the Silver Bell Copper Company, or to the receiver of said Company to be appointed, as in this judgment provided.

Second. That Louis Zeckendorf, plaintiff in the above entitled action, do have and recover of and from Albert Steinfeld his plaintiff's costs in this action, herein taxed in the sum of \$— and that plaintiff do have execution in his favor and against said defendant ther-for.

Third. That plaintiff, out of the said money recovered and to be recovered by said Silver Bell Copper Company from the said Albert Steinfeld, do have and recover of and from the said Silver Bell Copper Company, and be paid by the Silver Bell Copper Company the sum of \$15,000.00 as and for Attorneys' fees for the bringing of this action and the prosecution of the same up to and including the entry of this judgment; and it is further ordered that the receiver hereafter to be appointed herein and hereafter named, do pay to said plaintiff the said sum of \$15,000.00 out of the said moneys to be recovered by said Silver Bell Copper Company from the said Albert Steinfeld.

Fourth. That Albert Steinfeld holds the sum of \$25,750.00 money

of said Silver Bell Copper Company, in his hands as and for security to him against any liability on account of the garnishment levied on him in the action of Franklin vs. Silver Bell Copper Company, said Steinfeld to account to said corporation or to the receiver of
508 said corporation hereafter appointed, for said sum immediately upon the final determination and settlement of said action; and to pay to said Silver Bell Copper Company to said receiver any balance of said sum there may be left remaining after deducting therefrom such sums, if any, that said Steinfeld may pay or may have paid said Franklin on account of said garnishment, in the event said Franklin should recover in said action.

It is further ordered, adjudged and decreed and the Court does hereby order that Hiram W. Fenner be and he is hereby appointed receiver of all property, money, books and assets of any kind or character of or belonging to the said Silver Bell Copper Company and any person or persons having any money or assets belonging to the said Silver Bell Copper Company are hereby ordered to turn over and deliver the same to the said receiver, the same to be held by the said receiver and retained and kept in his possession, and to be distributed, paid out and disbursed upon the orders of this Court to be made from time to time in this action; said receiver to execute the usual oath of office and to give and execute a bond in the sum of \$275,000.00 in the usual form of receiver's bond, to be approved by this Court, for the faithful performance by him of his duties, as receiver; and the

said Hiram W. Fenner, as such receiver immediately upon
509 the filing of his oath and the approval of his bond, as aforesaid, is hereby ordered and directed to take immediate possession of all the moneys, property and other assets of the said Silver Bell Copper Company, and to hold and disburse the same in accordance with the orders and judgment herein contained, and in accordance with the orders to be made by this Court from time to time hereafter.

It is further ordered, adjudged and decreed that upon the final termination of this action, the said Silver Bell Copper Company shall be dissolved, and that thereupon all its debts and liabilities shall then be paid and discharged, and thereupon all property, money and assets of such corporation then remaining shall be distributed among its stockholders in the proportions of their several ownership of stock.

The said dissolution, payments, disbursements and distributions to be done and accomplished by orders of this Court for that purpose in this action made and to be made.

Done in open Court this 16th day of September, 1905.

JOHN H. CAMPBELL, *Judge.*

Filed Oct. 21, 1905.

510 Assignments of Error made by the defendants-appellants with respect to the first cause of action on the first appeal to the Supreme Court of the Territory of Arizona as the same appear in the brief of said defendants-appellants upon said appeal. Filed December 11, 1905.

Assignments of Error.

Assignment I.

The Court erred in the second finding of fact, in finding that Albert Steinfeld purchased 300 shares of stock theretofore belonging to one Carl S. Nielsen from the said Carl S. Nielsen, and thereafter, on the 13th day of January, 1901, a new certificate in lieu of the certificate purchased by the said Albert Steinfeld was issued for said 300 shares of stock to said Albert Steinfeld, the same being taken in his name as trustee, for the reason that said finding is misleading, and that the evidence does not support the same, unless the Court had found in addition thereto that said Steinfeld purchased the said stock from the said Nielsen with his own money and for his own use and benefit, and that the said certificate was delivered to him as his own property, and that the certificate thereafter issued in the name of the said Albert Steinfeld, trustee, was so signed and issued without the knowledge of the said Steinfeld.

Assignment II.

511 The Court erred in finding in the second finding of fact that on May 20, 1903, the said Albert Steinfeld held said stock in his possession and in his name as trustee for the Silver Bell Copper Company, and as the property of and for the benefit of said Silver Bell Copper Company, and said 300 shares of stock on said 20th day of May, 1903, was, and ever since has been the property of the said corporation, for the reason that the evidence does not sustain said finding; but on the contrary under the evidence the Court should have found that the said 300 shares of stock at all times since the purchase of the same from the said Nielsen has been the individual property of Albert Steinfeld.

Assignment III.

The Court erred in refusing to find as to the beneficial ownership of said stock, and in finding that it was immaterial to find with respect to the beneficial ownership of said stock, for the reasons heretofore alleged.

Assignment IV.

The Court erred in finding that of the 500 shares of stock belonging to L. Zeckendorf & Co., one share stood in the name of R. K. Shelton, but said R. K. Shelton at that time, however, had no interest nor ownership therein, on the ground that the said finding is contrary to the evidence.

512

Assignment V.

The Court erred in its fourth finding of fact, on the ground that there is no evidence to sustain said finding nor any fact therein.

Assignment VI.

The Court erred in finding that any action if brought in the name of the corporation, the Silver Bell Copper Company, would not have been prosecuted in good faith, on the ground that there is no evidence to sustain such finding.

Assignment VII.

The Court erred in refusing to find on the issues raised by the pleadings as to the ownership, legal or equitable, of the properties mentioned in Exhibit "A" of the complaint prior to the sale for the reason that said finding was material to said issues, and that if the said Court had found in accordance with the testimony of the defendants that the said properties were purchased by the said Steinfeld with his own money, and for his own use and benefit, and were after said purchase his own individual property, the judgment rendered in view of such finding would have been contrary to the law.

Assignment VIII.

513 The Court erred in finding that the agreement dated May 20, 1903, in finding seven set out, established the ownership of the entire price of the said property mentioned in Exhibit "A," to be in the said Silver Bell Copper Company or that the said Silver Bell Copper Company from and after such time continued to be the owner of the whole of said purchase price, for the reason that the said finding is not established by the evidence.

Assignment IX.

The Court erred in all that portion of the tenth finding of fact beginning with the words "but it was manifest to the directors of said corporation" to the end of the said finding, for the reason that there is no evidence to support said portion of such finding, and the said finding is contrary to the undisputed evidence.

Assignment X.

The Court erred in finding all that portion of the eleventh finding of fact beginning with the words "that in adopting said resolution," and to the end of said finding, on the ground that there is no evidence to support the said finding and that the said finding is contrary to the evidence.

Assignment XI.

514 The Court erred in its twelfth finding of fact in all that portion of the twelfth finding of fact in which the Court finds

that Curtis, Steinfeld or Shelton held purported meetings, or held purported meetings of directors, purporting to adopt resolutions, or that said Steinfeld converted any moneys or any note, or did anything that was not right or proper, on the ground that there is no evidence to sustain any of said portions of said finding.

Assignment XII.

The Court erred in that portion of the fourteenth finding of fact in which it finds that the 300 shares of stock mentioned therein belonged to the said Silver Bell Copper Company, or that the said Steinfeld converted to his own use and benefit the sum of \$33,300 received by him as dividend on said stock, or that the said dividend was paid to the said Steinfeld because of or on account of his control of said corporation, or that said dividend on said 300 shares of stock was the money and property of the said Silver Bell Copper Company, and that said Steinfeld had no right thereto, and no right to receive the same and convert the same to his own use, on the ground that the same is a conclusion of law, and not a finding of fact, and that there is no evidence to sustain such finding or said conclusion, and that the same is contrary to the evidence and to the law.

515

Assignment XIII.

The Court erred in finding that on the 9th day of January, 1904, Steinfeld paid to Francis and Volkert the sum of \$12,700 for the benefit of the Silver Bell Copper Company and on the 23rd day of January, 1904, Albert Steinfeld paid to Mary Nielsen the sum of \$10,000 for the benefit of the Silver Bell Copper Company, on the ground that there is no evidence to sustain the said finding, and that the same is contrary to the evidence.

Assignment XIV.

The Court erred in finding that the sum of \$15,000 is a reasonable sum to be allowed plaintiff by the Silver Bell Copper Company as and for attorneys' fees, for the reason that there is no evidence to sustain the said finding, and that the said finding is contrary to the evidence and the law.

Assignment XV.

The Court erred in its first conclusion of law, on the ground that the same is contrary to the evidence and the law.

Assignment XVI.

The Court erred in the second conclusion of law, on the ground that the same is contrary to the evidence and to the law.

516

Assignment XVII.

The Court erred in the third conclusion of law, on the ground that the same is contrary to the evidence and the law.

Assignment XVIII.

The Court erred in the fourth conclusion of law, on the ground that the same is contrary to the evidence and to the law.

Assignment XIX.

The Court erred in the fifth conclusion of law, on the ground that the same is contrary to the evidence and to the law.

Assignment XX.

The Court erred in the sixth conclusion of law, on the ground that the same is contrary to the evidence and to the law.

Assignment XXI.

The Court erred in the seventh conclusion of law on the ground that the same is contrary to the evidence and the law.

Assignment XXII.

The Court erred in rendering judgment, on the ground that the said judgment is contrary to the evidence and the law.

517

Assignment XXIII.

The Court erred in finding that the agreement of May 20, 1903, was not rescinded, for the reasons heretofore assigned, and for the following reasons in addition thereto:

a. An actual agreement of rescission was executed and delivered on December 26th, 1903, between the Mammoth Copper Company, the Silver Bell Copper Company and Albert Steinfeld parties to the agreement of May 20th; and by said rescinding agreement, the agreement of May 20th was rescinded and declared null and void ab initio and said rescission was consummated by the payment on December 26th, 1903, to the said Silver Bell Copper Company by Albert Steinfeld of the sum of \$18,117, which sum was the actual consideration for the execution of the agreement of May 20, 1903, and that said agreement of rescission was not attacked in the complaint as being fraudulent or void, and no request was made to avoid it, and the Court erred in ignoring the same and declaring the said agreement of May 20th not rescinded except in certain parts.

b. The resolution of December 26, 1903, was not attacked in the complaint, and there was no allegation that the same was fraudulent, or passed for fraudulent or improper purposes, or that the same was not regular in all respects; the finding that the directors at said meeting did not intend to rescind the said contract is obviously contrary to the evidence, for the reason that they immediately executed the said agreement of rescission and

518

consummated the same by Steinfeld returning to the Silver Bell Copper Company the said sum of \$18,117.

c. The finding that neither the stockholders nor Zeckendorf intended at the stockholders' meeting to rescind the said agreement of May 20, 1903, except in so far as the custody of the money is concerned, is entirely unsupported by the evidence. The action of the directors subsequent to the directors' meeting executing the contract of rescission and receiving the sum of \$18,117, is conclusive as to what was their intent.

d. It appears by the proceedings at the stockholders' meeting, as well as by the sixteenth finding of fact that prior to the stockholders' meeting Steinfeld had relinquished to the company the custody of the funds, and that after Steinfeld had so notified Zeckendorf and the other stockholders that he had relinquished such funds, the resolution of rescission was offered and voted for by Zeckendorf.

e. The refusal of Zeckendorf to dismiss the injunction suit instituted at San Francisco is conclusive that he desired a rescission.

f. The undisputed evidence that at the meeting at San Francisco between Zeckendorf, Steinfeld and their respective attorneys, Zeckendorf was notified when he threatened to institute such injunction suit, that if such suit were brought with a prayer to rescind the said agreement of May 20, Steinfeld would assent to the rescission and claim a proportionate part of the purchase price, and that such proportionate part was more than half of the said purchase price.

g. The fact of such statement to Zeckendorf or his attorney is conclusive as to what Zeckendorf's intent was when he voted for the rescission, and refused to dismiss the said suit.

h. The fact that Steinfeld formally gave Zeckendorf a copy of the agreement of May 20, furnished him with a copy of the minutes of the meeting, and stated that he would comply with said agreement in every detail if Zeckendorf would dismiss the suit to rescind the same, and that Zeckendorf refused to dismiss, is proof that Zeckendorf intended at all hazards to rescind the said agreement.

Assignment XXIV.

The Court erred in holding that the compromise between Steinfeld and the company on January 16, 1904, was improper or illegal, for the reason that it was not alleged in the complaint, nor was it an issue in the case that the said distribution was unfair, nor is it alleged nor does it appear that the corporation has elected to avoid the said contract of distribution and, therefore, the said resolution and distribution cannot be attacked in this action if it be established that Steinfeld was entitled to any proportion of such purchase price.

Assignment XXV.

The Court should have found that Steinfeld held all of the English group of mines as his own property, for the following reasons:

a. The evidence of his private books and his correspondence with Curtis, is conclusive that he intended to purchase them for his own use and benefit.

b. The theory of a constructive trusteeship with respect to said property cannot be sustained, because under the evidence and the law Steinfeld had perfect right to purchase the said mines for his own benefit.

c. Even if the evidence were contrary the complaint does not set forth facts sufficient to establish a constructive trusteeship, or a trusteeship in invitum.

d. Whatever the circumstances might have been, the proposition of July 15, 1901, in which Steinfeld claimed that the trusteeship would cease if he was not paid the money on the 15th of October,

1901, and the further resolution of October, 1901, in which
521 the company expressly accepted Steinfeld's offer to extend the said proposition until Sept. 15th, 1902, constituted an acquiescence by the company in the attitude thus assumed by Steinfeld and rendered Steinfeld ipso facto on the 15th day of September, 1902, the owner of the said group of mines for his own use and benefit.

Assignment XXVI.

The indebtedness of the corporation by its charter was limited to \$25,000 at the time of the purchase of the said mines, and during all the time thereafter, the indebtedness of the said company exceeded \$25,000, and it was therefore at no time legally authorized to enforce the trust in the said property for its own benefit, the enforcement of which would have required it to pay Steinfeld the purchase price of the said mines, and thus exceed its charter powers.

Assignment XXVII.

The Court should have found that Steinfeld was the owner of the 300 shares of stock for the following reasons:

a. It is the undisputed evidence that he bought the same with his own money and treated the same as his own property, and entered the same at the time of the purchase in his private books as an investment.

b. For the reason heretofore assigned with respect to the indebtedness of the company.

522 c. The corporation is without authority to purchase its own or any stock.

d. It is not alleged in the complaint that the beneficial ownership of the 300 shares of stock was affected by the agreement of May 20, 1903. On the contrary, it is expressly alleged that the \$18,117 was money expended by Steinfeld in the purchase of the English group of mines.

The plaintiff with respect to the 300 shares of stock and the \$33,300 dividend, relied entirely upon his allegations that Steinfeld purchased the stock for his own use and benefit, and that the declaration of the entire dividend was illegal.

Therefore, the Court erred in refusing to find upon the issue, to whether Steinfeld purchased said stock for his own use and benefit, or for the benefit of the corporation and in finding that the title to the said stock became established in Steinfeld by virtue of the agreement of May 20, 1903.

Assignment XXIX.

The Court erred in finding that between the 20th day of May 1903, and the 26th day of December, 1903, the ownership of the said purchase price, and 300 shares of stock was established in the Silver Bell Copper Company by virtue of the agreement of May 20, 1903, and without respect to the beneficial ownership of the

523 said property or stock prior thereto, for the reason that Steinfeld owned the said properties and the said stock for his own benefit on May 20, 1903, and acting under mistake of law superinduced by the advice of Franklin who was Steinfeld's confidential attorney, but who, in all these transactions was acting as the attorney of the Silver Bell Copper Company, was induced to treat the same as if he held them as trustee, then such agreement would have been inequitable and could not be enforced in a suit in equity instituted in behalf of the company and against Steinfeld.

Opening paragraph of Supplemental Brief filed by F. J. Heney, counsel for defendants-appellants, upon the first appeal to the Supreme Court of the Territory of Arizona. Filed January 3, 1906.

The paramount, and in fact the sole, issue upon this appeal is Does the evidence sustain findings "X" and "XI" of the trial court?

And on to-wit: the twelfth day of May, 1906, there was filed in the clerk's office of said Supreme Court of the Territory of Arizona on the first appeal in said entitled cause, a certain Opinion of the Court, in words and figures following, to-wit:

524 In the Supreme Court of the Territory of Arizona.

No. 943.

ALBERT STEINFELD, R. K. SHELTON, SILVER BELL COPPER COMPANY,
Corporation, and MAMMOTH COPPER COMPANY, a Corporation,
Appellants,

VS.

LOUIS ZECKENDORF, Appellee.

Appeal from District Court, Pima County.

Before Justice Campbell.

Francis J. Heney, and Eugene S. Ives, for appellants.
Edwin A. Meserve, and Frank H. Hereford, for appellee.

Opinion by Sloan, J.

The appellee, Louis Zeckendorf, brought suit as a stockholder of the Silver Bell Copper Company in the District Court of Pima County to recover, in behalf of said company, the proceeds of the sale of certain mining property alleged in the complaint to be wrongfully retained by the defendants, Albert Steinfeld, R. K. Shelton, and the Mammoth Copper Company, and to be the property of the said Silver Bell Copper Company.

The complaint charged that the board of directors of the Silver Bell Copper Company, which was made a party defendant, 525 was composed of the defendants, Steinfeld, Shelton, and one Curtis, and was dominated and controlled by the defendant Steinfeld, and that therefore the plaintiff had made no demand upon said board to bring the action, it being idle and purposeless to make such demand for the reason that such action would not be prosecuted by said board in good faith; that therefore appellee, as a stockholder of said corporation, brought the suit for its use and benefit. From a judgment in favor of plaintiff, Zeckendorf, the defendants have appealed.

The record of the case is voluminous, and a complete statement of the facts would necessarily occupy more space than is desirable, or necessary to a determination of the questions involved in this appeal. Such of the facts as bear directly upon the essential controversies are as follows:

The firm of Louis Zeckendorf & Co., during the times hereinafter mentioned, was composed of appellee, Louis Zeckendorf and appellant, Albert Steinfeld, and was engaged in the mercantile business in the City of Tucson. In January, 1899, the Silver Bell Copper Company was organized for the purpose of taking over the title to a mining claim known as "Old Boot" situated in the Silver Bell Mining District, Pima County, which had theretofore been held by Albert Steinfeld in trust for one William Zeckendorf. The capitalization

of the company was \$25,000.00, divided into 1,000 shares of the par value of Twenty-five Dollars each. At the time of the organization one Neilson was operating the mine under lease and was indebted to the firm of Louis Zeckendorf & Co. in excess of \$20,000.00. The stock of the company, with the exception of one share each given to Curtis and Shelton, was issued to Neilson, who divided it as follows: J. N. Curtis received 169 shares, the firm of Louis Zeckendorf & Co. 529 shares, 499 of these being for its own use, and 30 shares being held by the firm as trustee for Julia Zeckendorf, Neilson retaining 300 shares. The mine was thereafter operated by the company, but at a loss, so that in May, 1903, it owed the firm of L. Zeckendorf & Co. the sum of \$112,000.00. In June, 1900, Neilson sold his shares of stock to the defendant Steinfeld. The certificate for these shares of stock was made out in the name of Steinfeld, as trustee. In January, 1901, Steinfeld was elected a director of the company.

Surrounding the "Old Boot" mine was a group of mining claims known as the "English Group," these claims having been purchased by an English company prior to 1899. This group, prior to 1900, had been relocated by one Francis and one Volkert under the claim that the assessment work had not been done upon the property by the English company. The latter company continued to assert its title to the group upon the theory that Francis and Volkert, being its employees at the time of the relocations, the latter injured to its benefit. In May, 1900, Steinfeld purchased the title held by Francis and Volkert for the sum of \$15,000.00, \$2,500.00 of which being in cash and the remainder, under the terms of the sale, to be paid when Steinfeld should sell the same. At the time of this purchase Steinfeld caused to be organized the Mammoth Copper Company, all of the shares of stock of which were owned by him. The conveyance of the Francis and Volkert title was made to the Mammoth Copper Company. In August, 1900, Steinfeld went to Europe and purchased from the English company its title to the group of mines and obtained a deed therefor. The purchase price paid by Steinfeld to the English company was the sum of \$18,117.00. In the early part of 1901 the question as to the ownership of the 300 shares of stock purchased from Neilson by Steinfeld, and of the "English Group" of mines arose between Steinfeld and Curtis. The former claiming the absolute ownership of both the shares of stock and the mines, and the latter claiming that Steinfeld held the same in trust for the company. Curtis, thereupon, consulted S. M. Franklin, the company's attorney, and was advised by Franklin, that Steinfeld held both the stock and the mines as a trustee for the corporation. This advice was reported by Curtis to Steinfeld.

Upon receiving this advice Steinfeld demanded that interest be paid him by the company on the sums expended by him in the purchase of the stock of the mines. Curtis, as the Treasurer of the company, signed checks for said interest and sent them to Steinfeld. After the receipt of said checks by Steinfeld he consulted with Franklin as to his rights. He was advised by Franklin that because of his relations to the company he had no

legal right to make the purchases for his own benefit, but on the other hand had no right to compel the company to assume such purchases; that it was his duty to give to the company an opportunity, within a reasonable time, to reimburse him for his outlays and to take over the property if it so desired, and that if the company should not avail itself of his offer, Steinfeld would then hold the properties as his own. After receiving said advice Steinfeld returned the checks for the interest to Curtis. After receiving this legal advice Steinfeld signed and submitted to the company a proposition, prepared by Franklin, offering to transfer the "English Group" of mines to the company upon the condition that the latter accept the proposition on or before the 15th of October, 1901, and pay to him the amount of his disbursements on or before said date. On July 15th, 1901, the board of directors of the Silver Bell Copper Company passed a resolution calling a stockholders' meeting of the corporation to consider the proposition made by Steinfeld. No stock-
529 holders' meeting was in fact called or held. On October 1st, 1901, at a meeting of the board of directors Steinfeld proposed that, if the company would perform and pay for the assessment work on the "English Group" for the years of 1900, 1901 and 1902, he would extend his proposition from October 15th, 1901, until September 15th, 1902. A resolution was, thereupon, adopted accepting said proposition and authorizing the performance of the assessment work agreed to be done. Nothing thereafter was done by either Steinfeld or by the company relating in any way to the acceptance or rejection of Steinfeld's proposition and nothing was done towards carrying it into effect, aside from the doing of the assessment work for the years 1900, 1901 and 1902, which was required of the company by Steinfeld as a consideration for the extension of his proposition, until May 20th, 1902. In April, 1903, an option was given to one George A. Beaton for the purchase of the "Old Boot" and the "English Group" of mines for the sum of \$500,000.00. This option was signed by Steinfeld, the Mammoth Copper Company and the Silver Bell Copper Company. On May 20th, 1903, a sale under this option, was consummated for \$515,000, and a deed signed by the parties before named was made of the properties to the Imperial Copper Company. Of the purchase price the sum of \$115,000.00
530 was paid in cash at the time of sale, and four promissory notes each for \$100,000.00, payable in three, six, nine, and twelve months after date with interest were given. As a condition upon which the deal was consummated the Imperial Copper Company insisted that Steinfeld should personally guarantee title to the mines. Thereupon Steinfeld did agree to guarantee the title for one year during which time the Imperial Copper Company was to apply for patents and if any litigation arose the expense thereof was to be borne by Steinfeld. Upon the day when the sale to the Imperial Copper Company was consummated, to-wit: on May 20th, 1903, an agreement was entered into between Steinfeld and the board of directors of the Silver Bell Copper Company, which was incorporated in the minutes of the company, and which reads as follows:
"This agreement, made this 20th day of May, 1903, between the

Silver Bell Copper Company, a corporation organized and existing under the laws of the Territory of Arizona, party of the first part and the Mammoth Copper Company, a corporation organized and existing under the laws of the Territory of Arizona, party of the second part, and Albert Steinfeld of Tucson, party of the third part, witnesseth:

"Whereas, the parties hereto have this day agreed to sell certain mining claims and property to the Imperial Copper Company, a corporation, as per written agreements heretofore made, and deeds for which property are now in escrow with the Phoenix National Bank, of Phoenix, Ariz.; and

"Whereas, the parties hereto desire to settle and determine as between themselves, what disposition shall be made of the proceeds of said sale; and

Whereas, the said Albert Steinfeld has assumed certain obligations with the said Imperial Copper Company, as more fully appears in the various agreements heretofore entered into by him in making such sale, and particularly in a certain Guarantee Agreement, wherein, amongst other things, said Steinfeld guarantees the title to certain mining claims so sold or agreed to be sold, and the parties of the first part and the second part desire to indemnify him against loss by reason of any of the said matters or things so done by him.

"Now therefore, in consideration of the premises, and of the sum of One Dollar (\$1.00) by each of the parties hereto to the other in hand paid, receipt whereof is hereby acknowledged, and it is hereby mutually agreed that the purchase price paid and to be paid upon the sale, shall belong to and be the property of the said Silver Bell Copper Company.

"And it is further agreed that the four promissory notes of One Hundred Thousand Dollars (\$100,000.00) each, this day executed by the Imperial Copper Company to the Silver Bell Copper Company, upon said scale, as well as the proceeds of said promissory notes when collected, shall be held by the said Albert Steinfeld as trustee, and as security for, and indemnity against loss, damages or expense which may arise to him for or out of, or by reason of any and all obligations and liabilities which he has assumed with the said Imperial Copper Company, or any other person whatsoever.

"And it is further agreed that no dividend shall be declared by the said Silver Bell Copper Company until the stockholders of said company shall first have fully indemnified said Albert Steinfeld against loss, which might arise to him in the future, from or on account of any such obligations or liabilities so assumed by him.

"In witness whereof, the said corporations, parties of the first and second part, has caused these presents to be signed by its President and Secretary, and its corporate seal to be hereunto affixed by resolution of its board of directors, and the said Albert Steinfeld has hereunto placed his hand and seal the day and year first above written.

In triplicate."

Prior to the execution of this agreement another agreement had

532 been prepared which recited that Steinfeld, in consideration of \$18,117.00, paid by the company, transferred the title of the entire group of mines to the Silver Bell Copper Company. This reference to the title in this draft of the agreement was made, as it appears, pursuant to an oral agreement reached on the day of the sale between Steinfeld and the other directors of the Silver Bell Copper Company to renew his proposition of July 15th, 1901, upon the condition that the entire purchase price of the properties should be given him as security under his guaranty to the Imperial Copper Company, and that such purchase price should remain in his custody and control until he should be relieved from any responsibility incurred by him by reason of said guaranty. For some reason the latter agreement was not executed, but the one hereinbefore set forth was prepared and executed in its place.

Under the agreement of May 20th, 1903, Steinfeld received the \$115,000.00 paid in cash by the Imperial Copper Company and the four promissory notes and held them under and by virtue of said agreement. Subsequently the right of Steinfeld to the control and possession of the proceeds of the sale of the mines was raised by appellee, Louis Zeckendorf, and a stockholders' suit was brought by the latter in San Francisco to wrest possession from Steinfeld of the notes then held by the Bank of California as Steinfeld's custodian. Growing out of this suit and of the dispute relating to the disposition made by Steinfeld of the proceeds of the sale there arose many bitter controversies between Zeckendorf and Steinfeld. Zeckendorf insisted that the contract of May 20th, 1903, ought not to be enforced but should be rescinded. On the 26th of December, 1903, a stockholders' meeting of the Silver Bell Copper Company was held in the City of Tucson. At this meeting all of the stock was represented. A resolution was offered rescinding the agreement of May 20th, 1903. This resolution was adopted by the unanimous vote of the stockholders. After the adjournment of the stockholders' meeting, a meeting of the directors of the company was held, at which the following resolution was adopted:

"Be it Resolved:

"1. That the said resolutions passed by the directors on the said 20th day of May, 1903, be and the same are hereby rescinded and repealed.

2. That the said agreement heretofore recited in full, be rescinded and declared null and void.

3. That the president and treasurer of this company be empowered to receive from the said Steinfeld and from the Bank of California all of the said funds and the two said notes of the Imperial Copper Company, which have not yet matured and to give his proper receipt therefor.

4. That the officers of this company be instructed to execute forthwith and deliver to the said Steinfeld and the Mammoth Copper Company an agreement rescinding the said agreement ab initio; and to do and cause to be done all such things and acts as may be necessary to accomplish and consummate the full rescission of said agreement, and that J. N. Curtis, the president and treasurer
534 of the company be instructed to demand and receive from the

Bank of California the said money and notes now held by the said bank."

After the directors' meeting and on the same day an agreement was executed between Steinfeld, the Mammoth Copper Company, and the Silver Bell Copper Company, annulling the resolution and rescinding the agreement of May 20th, 1903, and Steinfeld thereupon repaid to Curtis, the treasurer of the Silver Bell Copper Company, the sum of \$18,117.00 which had been paid to him on the 20th day of May, 1903. The latter sum, Steinfeld testified, was paid him as consideration for the execution of the agreement of that date. Steinfeld, thereafter, turned over to Curtis, the treasurer of the company, the proceeds of the sale held by him, except the sum of \$51,500.00 which had been garnished in a suit brought against the company. On the 16th day of January, 1904, the board of directors of the Silver Bell Copper Company made and adopted a resolution, which recited, that Steinfeld and the Mammoth Copper Company claimed the ownership of and right of possession of more than one half the purchase price of the property sold, and claimed that the value of the property conveyed by them exceeded in value the property owned by the company; that it had been agreed by and between Steinfeld and the Mammoth Copper Company and the

535 Silver Bell Copper Company that the former should receive one half of the said proceeds and the Silver Bell Copper Company the remaining half, less certain commissions and amounts paid out to attorneys for services rendered the company. The resolution provided that the distribution should be made in accordance with this agreement, and further provided the manner in which it should be made. On the same day another resolution was adopted by said board which provided that a dividend of \$111.00 on each share of the capital stock of the Silver Bell Copper Company should be paid to the shareholders of record. This dividend was based upon the distribution of the proceeds of the sale as provided in the preceding resolution.

Thereafter a distribution of money was made in accordance with this resolution.

The court gave judgment upon the theory that the Silver Bell Copper Company was entitled to the whole of the proceeds of the sale of the entire properties to the Imperial Copper Company.

It is obvious that the contentions arising from the record relate to the effect of the agreement of May 20th, 1903, and of its rescission, upon the right of the Silver Bell Copper Company to all the proceeds derived from the sale of the entire property conveyed to the Imperial Copper Company, for the reason that the findings of the

536 court do not determine the rights of the parties irrespective of these. The court expressly stated in the findings that it did not deem the issues raised by the pleadings as to the beneficiary ownership of the shares of stock purchased from Neilsen by Steinfeld, and the beneficiary ownership of the "English Group" of mines prior to the 20th day of May, 1903, as material to the judgment, for the reason, that the agreement of May 20th, 1903, established the beneficiary ownership of said stock and the purchase

price of said mines in the Silver Bell Copper Company. The court found the facts above recited, which show that this agreement of May 20th, 1903, was rescinded by the parties thereto on the 26th day of December, 1903, but, found in the same connection that the resolution passed at the meeting of the stockholders of the Silver Bell Copper Company held on that day, while not procured by false representations, misconduct or fraudulent practice, was not intended by the stockholders to advise, direct, consent or assent to, the rescis-ion of any part of the agreement whereby the Silver Bell Copper Company became the owner of the entire purchase price of said property; and further found that in adopting said resolution the board of directors of the Silver Bell Copper Company did not intend thereby to cancel, rescind or annul any part of the agreement effecting the ownership of the entire proceeds of the sale of said properties; that all of the actions and purported actions of the said stockholders and said board of directors taken on the 26th day of December, 1903, had reference to the custody and not to the ownership of the proceeds of said sale.

Assuming the fact to be sustained by the evidence that the parties to the agreement of May 20th, 1903, in rescinding it did not intend thereby to affect all the provisions thereof, but only a part thereof, a question of law is thus presented. In the case of a written agreement, which is plain, unequivocal in its terms, and these are known by all the parties, where a written agreement for its rescis-ion is entered into by the parties which is equally plain and which does not in any of its expressed or implied terms reserve from the operation of the rescis-ion or attempt to continue in force thereafter any part of the agreement thus rescinded, but which, nevertheless, does not conform to the intent of the parties in that, it was not contemplated by them that the rescis-ion should affect a substantial part of the agreement, is such a mistake one of law or one of fact?

A mistake of law is an erroneous conclusion as to the legal effect of known facts. Anderson's Dictionary of Law. It is a general rule that a mistake of law as to the legal effect of an agreement, which is unconnected with a mistake of fact and where there is no fraud, imposition or undue advantage, will not be corrected by a court of equity.

538 Bank of U. S. vs. Daniels, 12 Pet. 32.
Hunt vs. Rousmaniere, 1 Pet. 14.

A mistake of fact is defined to be in general a mistake, not caused by the neglect of any legal duty on the part of the person making the mistake, and which consists in his ignorance of some fact, past or present, material to the transaction, or in his belief in the existence of some fact, material to the transaction, which does not exist. Such a mistake may afford ground for relief in a court of equity.

It seems clear from the findings of the court, that the misapprehension of the parties as to the effect of the rescis-ion of the agreement of May 20th, 1903, was as to the legal effect of the language used in the agreement, and did not arise from any misap-

prehension of fact. There is no room for doubt as to the meaning of the resolution of the stockholders or of the resolution of the board of directors of the Silver Bell Copper Company, or of the agreement of rescis-ion, as these were expressed. The former unequivocally refers to the agreement as an entirety, and the latter sets it forth in full, and specially provides that it shall be rescinded, annulled and held of no effect. It seems clear, therefore, that under the well established rule, above stated, that mistakes of law, unconnected with mistakes of fact, cannot be corrected by a court of equity, unless there be some fraud which in itself will afford ground
539 for equitable relief, the agreement of May 20th, 1903, without reference to the intent of the parties being otherwise than as expressed, must be regarded as rescinded as a whole. The court specifically found that there was no fraud in the transaction. That the rescis-ion cannot be construed otherwise than as an entirety is apparent from the nature of the agreement and the rights of the parties which were established therein. The agreement, after reciting that it was the desire of the parties to settle the question of the disposition of the proceeds of the sale, and after reciting that Steinfeld had assumed certain obligations as a guarantor of the titles of the properties, contained three provisions: First, that said proceeds should be the property of the Silver Bell Copper Company, second, that Steinfeld should hold the same as security against loss arising from said guaranty, and third, that no dividend should be declared by the company until Steinfeld should be indemnified from any such loss. It is impossible to read into this agreement any provision which establishes title to any of the properties sold, either in Steinfeld or in the company. It relates wholly and entirely to the proceeds of the sale and only establishes the disposition to be made of these proceeds. Again, the agreement, relating as we have
540 seen to the distribution of the proceeds which had not at the time of its execution been made, was executory in its nature and remained such when this suit was brought. It, therefore, was as to all of its provisions the subject of rescis-ion. Furthermore, its various provisions relating to but one thing, namely the disposition of the proceeds of the sale, none of these can be severed from the whole without affecting the others. The finding of the court, that the agreement was rescinded, must be taken, therefore, notwithstanding the finding of the court that the parties did not so construe the effect of their rescis-ion, as an adjudication that all rights created by the agreement were abrogated by the parties.

With the agreement of May 20th, 1903, out of the way, the court could determine the rights of the parties to the proceeds of the sale to the Imperial Copper Company solely, as it found the rights of ownership of the various parties to the 300 shares of stock and to the "English Group" of claims to have been prior to the execution of said agreement. The court should have found the facts as to such ownership from the evidence in the case. We may not assume that the judgment was based upon such a finding of fact, for the reason that the court, as we have seen distinctly stated that no such finding was made. Were the facts appertaining to

the purchase by Steinfeld of the 300 shares of stock, and of the
 "English Group" of mines, and his subsequent conduct relat-
 541 ing thereto which may have determined the nature of his
 title, ascertainable, without the necessity of determining
 conflicting testimony this court might find such facts and give
 judgment accordingly. The state of the record and the contra-
 dictory nature of some of the material evidence prevents us from
 so doing.

The effect of the rescission of the agreement, in the absence of any
 findings as to the ownership of the 300 shares of stock of the Silver
 Bell Copper Company, and of the "English Group" of mines, and
 as to the rights of the several parties to the distribution of the
 proceeds of the sale, is to leave the judgment unsupported upon
 these essential issues.

It is unnecessary to consider the question discussed in the briefs,
 whether the resolution of January 16, 1904, was void or merely
 voidable. It is quite clear that it is the subject of attack in this suit
 brought by Zeckendorf as a minority stockholder of the Silver Bell
 Copper Company, and that, should it appear that the company is
 entitled to any of the proceeds awarded to any of the appellees by
 the terms of the resolution, the latter is not binding upon him
 or the company.

For the reason that the findings do not support the judgment, it
 will be reversed and a new trial granted.

542

RICHARD E. SLOAN, A. J.

We concur:

EDWARD KENT, C. J.

FLETCHER M. DOAN, A. J.

I am unable to concur in the conclusion reached by the majority
 of the court. The minutes of the meeting of the board of directors
 of May 20, 1903, record the following, among other, transactions:

"The president reported that Mr. Albert Steinfeld, who had con-
 ducted the negotiations with the Imperial Copper Company, had
 again submitted for acceptance, the proposition which he had hereto-
 fore submitted in writing on July 15th, 1901, with the modifications,
 however, that, this company shall pay to him forthwith in cash, the
 sums of money, which in said proposition were required to be paid
 on October 15th, 1901, * * * and that this company shall also
 assume and pay all obligations, which he, said Steinfeld, has in-
 curred in conducting the negotiations and in making the sale of said
 mining claims and property to the Imperial Copper Company and
 keep him free and harmless from any and all expense and loss which
 may arise by reason of any claim or asserted claim, of any person
 whatsoever, for or on account of or arising out of or connected with
 the present sale and negotiations or any past negotiation or transac-
 tion in regard to said mining claims or any of them. And particu-
 larly that this company shall assume and pay unto N. O. Murphy
 the commissions which he, said Steinfeld agreed to pay to said Mur-
 phy, to-wit: the sum of \$25,000, said agreement being made for and

on behalf of this company and also shall keep him harmless from loss, damage or expense, by reason of the asserted claim of one J. M. Burnett for commission.

"Also that this company shall indemnify him against loss, damage and expense, by reason of his having guaranteed the titles to the mining claims sold or agreed to be sold to said Imperial Copper Company, as is set forth in the guarantee agreement heretofore submitted to this meeting.

* * * * *

543 "He then submitted the agreement between this company, the said Mammoth Copper Company, and Albert Steinfeld, on this point, and also covering the matter of guarantee.

"After a full consideration the following resolutions were unanimously adopted, to-wit:

(1) "Resolved, that all of the acts of the president and secretary of this corporation, and all papers, agreements and deeds signed by them for or on behalf of this corporation in the matter of the negotiation and sale *by* this company's property to the Imperial Copper Company, be, and the same hereby are, ratified, approved and confirmed.

(2) "Resolved that the proposition of Albert Steinfeld as herewith submitted be, and the same hereby is accepted, and that he, said Steinfeld, be forthwith paid by this corporation the sum of eighteen thousand one hundred and seventeen dollars (\$18,117.00) and out of the first moneys received by this company upon the promissory notes of the Imperial Copper Company, he, said Steinfeld, as treasurer of this company, shall retain sufficient moneys to pay the amount necessary to be paid to Margaret Francis and Julius H. Volkert under the agreement with them aforesaid; and to pay to the assigns or legal representatives of Carl S. Neilsen (he being now deceased) and to Mary Neilsen, the amount necessary to be paid under the agreement with said Neilsens aforesaid; and, when said amounts respectively become due, to pay the same to the parties entitled thereto.

(3) "Resolved, that Albert Steinfeld, as treasurer of this company, be and he is hereby authorized to pay N. O. Murphy whatever commissions may be coming to him.

(4) "Resolved, that the agreement this day made by the president and secretary of the corporation with the Mammoth Copper Company and Albert Steinfeld, in regard to the disposition of the proceeds of the sale this day made to the Imperial Copper Company, and indemnifying said Steinfeld, be, and the same is hereby ratified, approved and confirmed.

(5) "Resolved, that the president and secretary of this corporation be, and they are hereby authorized, empowered and directed, in such manner and form as they deem necessary or proper, to indemnify said Steinfeld, against all loss, damage and expense that may arise to him by reason of his having guaranteed the titles to the properties so sold, or agreed to be sold to the said Imperial Copper Company and that he, and they hereby are, authorized, empowered
544 and directed to do or cause to be done all things, and to execute all papers, documents or other writings, which they deem necessary in the premises."

The figures in parentheses prefacing the paragraphs of the resolutions are not in the original minutes, but are placed there by me for convenience of reference. The agreement mentioned in paragraph numbered (4) is that set forth in the majority opinion. I concur in the opinion of the majority of the court, that this agreement was rescinded in its entirety for the reasons stated. But the proposition of July 15, 1901, referred to in the first portion of the minutes quoted, was a proposition by Albert Steinfeld to the effect that upon reimbursement by the company for certain expenses he would hold the English group of mines and the 300 shares of Neilsen stock in trust for the company. It is my view that upon the renewal and formal acceptance of that offer as recorded in these minutes, the beneficial ownership of the Neilsen stock and of the proceeds of the sale of those mines was established in the company, irrespective of former circumstances of ownership. (For brevity's sake I am not stating precisely the facts as to the Neilsen stock. It stands in somewhat different situation from that of the English group of mines, and the proceeds thereof; but the difference is immaterial with reference to the point I am making.) Regarding the matter contained in

545 the quoted minutes, there is no dispute. At the stockholders' meeting on December 26, 1903, Mr. Ives, as Mr. Steinfeld's attorney, produced a copy of the complaint filed in San Francisco by Mr. Zeckendorf, in which the latter sought a judicial annulment of the agreement referred to in paragraph (4) of the minutes. In that complaint Zeckendorf set forth in *hæc verba* the resolutions which I have numbered (4) and (5), and prayed for their annulment, together with the agreement. Mr. Ives read, and there was entered upon the minutes of the stockholders' meeting, the prayer of that complaint, a portion of which is:

"that the resolution and agreement therein referred to be declared null and void."

The minutes of the stockholders' meeting disclosed that the only resolution or resolutions referred to at any time in the meeting were the two paragraphs quoted in the Zeckendorf complaint. The stockholders unanimously adopted the following resolution:

"Resolved, That the agreement executed on May 20th, by the president and secretary of the corporation with the Mammoth Copper Company and Albert Steinfeld, a copy of which is hereto annexed, be, and the same is, hereby rescinded; and that the said agreement and the resolution of the directors passed on said day, be declared null and void."

546 The agreement annexed was the agreement quoted in the opinion in this case. What resolution was rescinded? Manifestly, not the entire body of resolutions which I have quoted. Manifestly, to my mind, the resolution rescinded was the only resolution referred to in anywise at the stockholders' meeting, viz. the paragraphs set forth in Zeckendorf's complaint, which in my extract from the minutes are paragraphs (4) and (5). The acceptance of Steinfeld's renewed offer of July 15, 1901, was untouched by the rescission. The sole effect of the rescission sought to be made by the

stockholders would be to remove from Steinfeld the custody of the proceeds of the sale. If the directors and officers of the company went further than this and undertook to rescind the resolution or acts of the company by which the ownership of the Neilsen stock, or of the proceeds of the sale of the mines, became established in the company, and to donate to, or revest in, if originally vested in, Steinfeld that stock or those proceeds, their acts being the acts of Steinfeld dealing with Steinfeld (adopting as we should the court's finding that *that* the board of directors and the officers of the company were entirely under Steinfeld's domination), they cannot be countenanced or recognized as effective.

Therefore, while the findings of fact seem to refer to the agreement, quoted in the opinion, as establishing the ownership of the proceeds of the sale in the company, the error is not material; the offer by Steinfeld, and its acceptance, effected on the same day as the execution of this indemnity agreement, the execution of which was
547 but a partial fulfillment of the conditions attached by Steinfeld to the offer, in my opinion accomplished the adjustment of the ownership of those proceeds, and of the Neilsen stock. To determine this fact, a retrial is unnecessary. There appearing no other error in the record, the judgment should be affirmed.

FREDERICK S. NAVE,

Associate Justice.

And on to-wit: the twelfth day of May, 1906, being one of the regular juridical days of the January term of said Supreme Court of the Territory of Arizona, 1906, the following order and judgment, inter alia, was had and entered of record in said cause, in words and figures following, to-wit:

No. 943.

ALBERT STEINFELD, R. K. SHELTON, SILVER BELL COPPER COMPANY, a Corporation, and Mammoth Copper Company, a Corporation, Appellants,

VS.

LOUIS ZECKENDORF, Appellee.

This cause having been heretofore submitted, and by the Court taken under consideration, and the Court having considered the same and being fully advised in the premises:

548 It is ordered that the judgment of the lower court be and the same is, hereby reversed, and a new trial granted.

It is further ordered, Adjudged and Decreed, that the appellants herein do have and recover of and from Louis Zeckendorf, appellee herein, their costs in this court, taxed at —.

And on to-wit: the twenty-third day of March, 1907, there was filed in the clerk's office of said Supreme Court of the Territory of Arizona on the first appeal in said entitled cause, a certain Opinion of the Court on re-hearing, in words and figures following to-wit:

549 In the Supreme Court of the Territory of Arizona.

No. 943.

ALBERT STEINFELD et al., Appellants,

vs.

LOUIS ZECKENDORF et al., Appellees.

On Rehearing

NAVE, J.:

The facts in this case have been fully set forth in the majority and dissenting opinions heretofore filed, and reported in the 83 Pac. 7.

The resolutions adopted by the board of directors of the Silver Bell Copper Company on May 20, 1903, contained a formal acceptance of a proposition of Albert Steinfeld therein referred to, and a formal ratification of an agreement recited in those minutes to have been made that day by the president and secretary of the corporation with the Mammoth Copper Company and Albert Steinfeld. In the resolutions this agreement is described as being "in regard to the disposition of the proceeds of the sale this day made to the Imperial Copper Company, and indemnifying said Steinfeld." It was stated by me in my dissenting opinion at the former hearing that this paragraph, together with another paragraph of the resolutions, was rescinded by the action of the board of directors on December 26, 1903, pursuant to a resolution of the stockholders of that same date. It was also stated in that dissenting opinion that the

550 agreement annexed to the resolution of the stockholders of December 26, 1903, (set forth in full in the prevailing opinion at that hearing) was rescinded in toto. One sentence in that agreement is as follows: "in consideration of the premises and of the sum of one dollar by each of the parties hereto to the other in hand paid, the receipt whereof is hereby acknowledged, it is hereby mutually agreed that the purchase price paid and to be paid upon the sale shall belong to and be the property of the said Silver Bell Copper Company."

I am now of the opinion, contrary to that which I entertained at the former hearing, that this agreement was the formal expression of that portion of the contract created by Steinfeld's offer and its acceptance, which pertained to the conveyance of the mining claims or the proceeds of the sale thereof; that it was in fact the instrument of conveyance. In this view, the rescission of that agreement operated to restore the status of the parties with respect to the ownership of the mining claims, and of the purchase price of the mining claims, to that existing prior to the execution of the rescinded agreement. It becomes necessary to ascertain that status. For reasons stated in the prevailing opinion at the former hearing, I deem that this may more appropriately be done by the trial court than by this court. I concur in that opinion.

551 The Chief Justice, Mr. Justice Sloan and Mr. Justice Doan upon the reargument of the cause, have found no reason to modify their views, as heretofore expressed.

FREDERICK S. NAVE, A. J.

Per CURIAM (Mr. Justice Campbell not sitting):

The judgment of the district court is reversed, and the cause remanded for a new trial.

EDWARD KENT, C. J.

RICHARD E. SLOAN, A. J.

FLETCHER M. DOAN, A. J.

FREDERICK S. NAVE,

Asso. Just.

And on the same day, to-wit: the twenty-third day of March, 1907 being one of the regular juridical days of the January term of said Supreme Court of the Territory of Arizona, 1907, the following order and judgment, inter alia, was had and entered of record in said cause, in words and figures following, to-wit:

552

No. 943.

ALBERT STEINFELD, R. K. SHELTON, SILVER BELL COPPER COMPANY a Corporation, and Mammoth Copper Company, a Corporation Appellants,

VS.

LOUIS ZECKENDORF, Appellee.

This cause having been heretofore submitted and by the Court taken under advisement, and the Court having considered the same and being fully advised in the premises:

It is ordered that the judgment of the District Court be, and the same is hereby, reversed, and the cause remanded for a new trial.

It is further ordered, adjudged and decreed, that the appellant herein, do have and recover of and from Louis Zeckendorf, appellee herein, their costs in this court, taxed at eight hundred forty-five and 20/100 (\$845.20) dollars, and have execution therefor.

553 In the District Court of the First Judicial District of the Territory of Arizona in and for the County of Pima.

LOUIS ZECKENDORF, Plaintiff,

VS.

ALBERT STEINFELD, R. K. SHELTON, J. N. CURTIS, SILVER BELL Copper Company, a Corporation, and Mammoth Copper Company a Corporation, Defendants.

Third Amended Complaint.

Comes now the plaintiff in the above entitled action and files this his third amended complaint in said action, and complaining of the above named defendants, for — of action alleges:

554

I.

That the defendant, the Silver Bell Copper Company, is now, and for all of the times herein mentioned, has been a corporation organized, existing and doing business under and by virtue of the laws of the Territory of Arizona, with its principal place of business in the City of Tucson, County of Pima in said Territory; that for all of the times herein mentioned subsequent to January, 1901, defendants Albert Steinfeld, J. N. Curtis and R. K. Shelton have been and now are the directors of said corporation, all of said parties being residents of said City of Tucson, County and Territory aforesaid;

That plaintiff for all of the times herein mentioned, has been and now is a stockholder of said corporation and he is now and, for all of the times herein mentioned, has been a resident of the City of New York, State of New York;

That the entire capital stock of said corporation was divided into one thousand shares, all of which said one thousand shares was originally issued by said corporation, for value, in accordance with the laws of the said Territory of Arizona; that thereafter, and prior to the 20th day of May, 1903, three hundred shares of the said stock were purchased by said corporation, the same being taken in the name of Albert Steinfeld, trustee; that at all times after said purchase, said Albert Steinfeld held said stock in his possession as trustee as the property of and for the benefit of said corporation; that since long prior to the said 20th day of May, 1903, the actual outstanding stock of said corporation has been seven hundred shares, divided, owned and held as follows: By Albert Steinfeld, two hundred and forty-nine shares; by R. K. Shelton, one share; apparently by J. N. Curtis, one hundred and seventy shares; by Albert Steinfeld, trustee for J. W. Zeckendorf, thirty shares and by this plaintiff, two hundred and fifty shares; that the said one share of stock standing upon the books of the company in the name of said R. K. Shelton was, in fact, the property and is now the property of said Albert Steinfeld and said R. K. Shelton, as a matter of fact, has no interest or property therein;

That the said Mammoth Copper Company is now and, for all of the times herein mentioned, has been a corporation organized and existing under the laws of the Territory of Arizona, having its principal place of business at Tucson, Pima County, said Territory; that the defendant Albert Steinfeld is now, and for all of the times herein mentioned, has been the owner in fact of all of the capital stock of said Mammoth Copper Company; that any stock standing in the name of any other party in order to enable him to qualify as a director is simply held by said party for that purpose and the same belongs to, and is, in fact, the property of the said Albert Steinfeld, and the said Mammoth Copper Company, as this affiant is informed and believes and so alleges the fact to be, is but an instrument in the hands of the defendant Albert Steinfeld used by him for the business of transacting business for himself, in his own name and for the purpose of covering up any frauds or illegal transactions which he may enter into, or care to enter into in the

name of the said Mammoth Copper Company; that any money
557 which may, on its face, have been paid to the defendant Albert
Steinfeld, and any property which may, on its face, have
been delivered to the said Albert Steinfeld, as hereinafter alleged
and set out, for the benefit of the said Albert Steinfeld, and the said
Mammoth Copper Company, jointly, in fact and in truth, were paid
and delivered to the said Albert Steinfeld and were appropriated by
him, to his own individual use; and that all acts and things done
by him and in the name of the said Mammoth Copper Company, and
all things received, given or paid by to or in the name of the said
Mammoth Copper Company, were, in fact, acts, things done, received,
given and paid by and to the said Albert Steinfeld;

II.

That the said R. K. Shelton, defendant, at all the times herein
mentioned, has been the representative of the said Albert Steinfeld
on said board of directors and, at all times herein mentioned, has
voted as ordered, directed and requested by said Albert Steinfeld,
and not otherwise; that said defendant, J. N. Curtis, at all
558 times herein mentioned, was under the control and direction
of said Albert Steinfeld and, as a director of said corporation,
at all times, did what the said Albert Steinfeld directed or requested
and, at no time and under no circumstances, did the said J. N.
Curtis, as a director of the said corporation, do any act, take any
vote, or cast any ballot, except as requested or directed by the said
Albert Steinfeld; that the said Albert Steinfeld, at all of the times
herein mentioned, was, in fact, by reason of his control of the other
two members of the said board, in absolute control and direction of
the board of directors of the said defendant corporation and all acts,
things and votes taken by said board since before the 20th day of
May, 1903, and up to and including the present time, were taken
by and under the direction of the said Albert Steinfeld and at his
request, and not otherwise, and all votes, motions, resolutions and
other acts of said board adopted, passed or done by it were done by
and under the direction of and control of the said Albert Steinfeld,
and not otherwise;

That because of the facts hereinabove alleged, it would be
559 an idle and useless act for this plaintiff to make any demand
whatsoever on the said board of directors to bring any action
against the said Albert Steinfeld, the said J. N. Curtis or the said
R. K. Shelton for the recovery of the property belonging to the said
corporation or for the payment to said corporation of any debt
owing by said parties or either of them and particularly by the said
Albert Steinfeld, to said corporation and that any such action, if
brought in the name of said corporation, would not be prosecuted
in good faith and with a full intent and purpose that a full recovery
should be had thereon for the benefit of said corporation, and of
this plaintiff, as a stockholder thereof; and for such reasons and
because of such facts and because it would be idle and purposeless
so to do, this plaintiff has made no demand whatsoever on said cor-

poration that it bring this action or that it prosecute the same; and this plaintiff now brings this action as a stockholder of said defendant corporation for its use and benefit and in order that its property, illegally taken from it as hereinafter set forth, may be recovered and restored to its assets.

560

III.

That ever since the year 1878 this plaintiff and defendant Albert Steinfeld were partners, doing business in the City of Tucson under the name of L. Zeckendorf & Company; that under and by virtue of the articles of partnership and contracts existing between plaintiff and said Albert Steinfeld, sixty-four (64) per cent of said business and fifty-five (55) per cent of the profits to be derived therefrom, except as to the profits to be derived from mines and as to mines and mining properties, was to go to this plaintiff, thirty-six (36) per cent of the business and forty-five (45) per cent of the profits to said defendant, Albert Steinfeld; that under and by virtue of said contracts the ownership of all mines that should be acquired by said firm and profits to be acquired by mining transactions were to be divided fifty (50) per cent to plaintiff and fifty (50) per cent to said Steinfeld; that under said contracts, all indebtedness which said firm would have against any person or corporation would be owned sixty-four (64) per cent by this plaintiff and thirty-six (36) per cent by said Albert Steinfeld; and that, in consequence thereof, any loss which should be sustained by reason of the non-payment of any of said indebtedness would be sustained, sixty-four (64) per cent by this plaintiff and thirty-six (36) per cent by said Albert Steinfeld, and such was the condition at all times up to and including the commencement of this action; that this plaintiff, at all said times, was a resident of the city of New York, State of New York, and said Albert Steinfeld was a resident of the City of Tucson, County of Pima, Territory of Arizona, and that during all of said times said Albert Steinfeld was the general manager of the said business of L. Zeckendorf & Company, in actual and active control of its business and its business affairs in said Territory, and employed and discharged all of its help and gave and extended all credits and determined its business policy in all matters and things in said Territory of Arizona and in connection with its business therein; that for some time prior to the 14th day of January, 1899, William and Julia Zeckendorf were the owners of what is known as the Mammoth, or the Old Boot mine, being one of the mines described in Schedule A, hereto attached; that the legal title to said mine stood in the name of said Albert Steinfeld, and said Albert Steinfeld held the same as trustee for said William and Julia Zeckendorf; that for some time prior to said 14th day of January, 1899, one Carl Neilsen had a working contract on said mine, executed by said Albert Steinfeld as the ostensible owner thereof, but for the real use and benefit of said William and Julia Zeckendorf, under and by virtue of which said Neilson was to have

562

the right to operate said mine and to take the ores therefrom and to pay to said Steinfeld, for the use and benefit of said William and Julia Zeckendorf, certain royalties on all ore extracted from said mine; that during the operation of said mine, said Albert Steinfeld as the manager of said L. Zeckendorf and Company, and in actual control of the business of said company, advanced and extended to said Carl Neilsen certain credits, and sold to him on credit large amounts of merchandise, resulting in said Carl Neilsen, on and prior to the 14th day of January, 1899, becoming indebted to said L. Zeckendorf and Company in a large sum of money.

563 That defendant, J. N. Curtis, during the time herein last above mentioned, was in the employ of said L. Zeckendorf and Company and in charge of its mines and mining properties, and at all said times took active personal charge of its mines and mining properties and attended to the direction of same and to the sales thereof; and received as his compensation for such work certain pay for his time and certain commission on sales of mines might be made by him, or through or under his influence or by his help and assistance; that on or about the 14th day of January, 1899, in order to protect said indebtedness so owing to said L. Zeckendorf and Company by said Carl Neilsen, said Albert Steinfeld caused the Neilsen Mining and Smelting Company to be incorporated, under the laws of the Territory of Arizona, the name of said Neilsen Mining and Smelting Company being thereafter changed to the Silver Bell Copper Company, and being the same corporation herein sued as a defendant in this action, under the name of the Silver Bell Copper Company; that at the same time and as a part of the same general transaction, said Albert Steinfeld

564 caused to be conveyed to said Neilsen Mining and Smelting Company the said Mammoth, or Old Boot mine, for an agreed price of twenty-five thousand (\$25,000.00) dollars, to be paid to said William and Julia Zeckendorf in installments of twenty-five hundred (\$2500.00) dollars, to be paid each three months, and thereupon said Carl Neilsen transferred to said Neilsen Mining and Smelting Company his working contract on said mine above mentioned and said Neilsen Mining and Smelting Company assumed said indebtedness owing to said L. Zeckendorf and Company, and the same was then charged on the books of said L. Zeckendorf and Company by the order and under the direction of said Albert Steinfeld, as general manager to the said Neilsen Mining and Smelting Company, and the same was thereafter carried on the books of L. Zeckendorf and Company, in the name of Neilsen Mining and Smelting Company; and at the same time L. Zeckendorf and Company, by said Albert Steinfeld, its general manager aforesaid, released said Carl Neilsen from all personal obligations on said indebtedness; that thereupon the stock of

565 the said Neilsen Mining and Smelting Company was divided as follows, to-wit: five hundred (500) shares thereof to said L. Zeckendorf and Company; thirty (30) shares thereof in the name of said L. Zeckendorf and Company for the benefit of said William and Julia Zeckendorf and in trust for

them, one hundred and seventy (170) shares to said J. N. Curtis, three hundred (300) shares to said Carl Neilsen; said one hundred and seventy shares to said J. N. Curtis being given to him by said Albert Steinfeld, as the manager of said L. Zeckendorf and Company, as compensation for his services in connection with said transfer, and said three hundred shares being issued to said Carl Neilsen in consideration of the relinquishment by him of his said contract for working on said mine; that the directors of said company thereupon elected were said defendant, J. N. Curtis, said Carl Neilsen and defendant, R. K. Shelton; that said Carl Neilsen was elected the nominal general manager and superintendent of said company and J. N. Curtis the president and said R. K. Shelton elected the secretary of said company, but at all times thereafter said Albert Steinfeld assumed to be the general manager of said company and assumed the power of directing its affairs and of controlling all of its actions, and said assumption of power on the part of the said Albert Steinfeld was assented to and acknowledged by the said J. N. Curtis, Carl Neilsen and R. K. Shelton, and said Steinfeld at all times thereafter was the actual manager and managing agent of said company and of its affairs.

That thereupon said Neilsen Mining and Smelting Company entered upon the work of the development of said Mammoth or Old Boot mine, said Carl Neilsen, as superintendent, being in actual charge thereof; and under said operation large ore bodies in said mine were developed and were extended to within a short distance of the southern boundary line thereof, being the dividing line between said mine and the Prospector mine, one of the mines known as the English group of mines hereinafter referred to, and that it thereupon became evident that said ore bodies then developed underneath the ground in said Mammoth mine ran into said Prospector mine and other of said English group of mines, the said facts being ascertainable alone from an examination and inspection of the underground workings of said Mammoth or Old Boot mine; that at about the same time the said J. N. Curtis on the order and direction of said Albert Steinfeld took up in his own name other mines around and surrounding said Old Boot mine, all for the use and benefit of said Neilsen Mining and Smelting Company, or Silver Bell Copper Company, and the same were carried by said J. N. Curtis thereafter in his own name, but as the property of and for the use and benefit of said Silver Bell Copper Company, said mines being included in the mines sold to the Imperial Copper Company and being part of the mines described in said Schedule Exhibit A, hereto attached;

That during all the times herein mentioned those mines known as the English group of mines, being a part of mines described in Schedule Exhibit A hereto attached, and specially so listed thereon, surrounded said properties of the Silver Bell Copper Company; that the beneficial ownership of said mines was in certain parties resident in England, from which fact the said mines came to be known as the English group of mines; that one Francis and one Volkert claimed that said mines were open to loca-

tion and had filed locations on the same and were also claiming title thereto; that this condition of ownership by said English parties continued through the year 1899 and through the year 1900, up to the time of the purchase by Albert Steinfeld, hereinafter mentioned, of what is known as the English title thereto; that the Francis and Volkert claims to said mines were initiated on or about the first day of January, 1900; that said Mammoth or Old Boot mine, during the fall of the year 1899 and up to the time of the closing of said mine in the spring of 1900, was being worked at a profit; and at the time of the closing of said mine, hereinafter mentioned, was yielding a profit of about five hundred dollars (\$500.00) per day, or fifteen thousand dollars (\$15,000.00) per month; that at said time said Neilsen Mining and Smelting Company was heavily indebted to said firm of L. Zeckendorf and Company for moneys which had been advanced by said L. Zeckendorf and Company to said Neilsen Mining and Smelting Company, to enable it to develop and open up said mine and to buy machinery, mills and other property necessary for the working of said mine and the handling of ores taken therefrom, and also for certain goods, wares and merchandise sold by said L. Zeckendorf and Company to said Neilsen Mining and Smelting Company;

That in the fall of 1899, said J. N. Curtis, the president of said Neilsen Mining and Smelting Company, advised and informed said Albert Steinfeld that the developments of said Mammoth mine showed that the underground ore bodies therein would run into said Prospector mine and other mines belonging to said English group of mines, and that said underground workings showed that there *was* probably great values in said English group of mines; and that at about the same time said Albert Steinfeld became dissatisfied with the management of said Carl Neilsen and with his work as superintendent and general manager of said mine; and thereupon and in the month of January, 1900, said Albert Steinfeld assumed to discharge said Carl Neilsen as general manager and superintendent of said mine, notwithstanding that he had been elected by the board of directors of said company; and at the same time ordered said Mammoth mine to be closed down and all work thereon to be stopped, in order that the English group of mines, so called, and the Francis-Volkert titles thereto might be purchased at a nominal, or small, sum, without the owners thereof obtaining knowledge through the workings of said Mammoth mine and the showing of ore therein that said ore bodies probably did, or would extend into said English group of mines;

That said J. N. Curtis, as the president of said Neilsen Mining and Smelting Company, prior to said time, had frequently advised and notified said Albert Steinfeld that it was very desirable in fact necessary that said English group of mines, so called, should be purchased for said Neilsen Mining and Smelting Company in order that all of the mines and mining claims surrounding said Mammoth mine should constitute one group and in order that the whole

- thereof might be sold as one group and one property, as any intending purchaser would, upon examination of said Mammoth mine, soon ascertain that the ore bodies therein probably extended into said English group of mines, and because of the fact that all purchasers of large mining properties desired to control all claims immediately surrounding any developed mine or mines; that said Albert Steinfeld, before ordering said mine to be closed and work thereon to be stopped, visited said mine and examined the same and ascertained and learned the truth of the statements so made to him by said J. N. Curtis, both as to the ore bodies in said mine and their tendencies, as above alleged, and also as to the necessity of acquiring title to said English mines, so that all of said mines and mining properties described in said Schedule A, hereto attached, could or might be sold as one group and one property; that said Albert Steinfeld acquired said information only and solely because of the fact that he was acknowledged and conceded to be the actual manager of said Neilsen Mining and Smelting Company, and because of his assumption of such power and of such possession; and that he acquired said knowledge
- 572 and information solely from said J. N. Curtis, the president of the said Neilsen Mining and Smelting Company, and from his examination of said mine made by him as such assumed and acknowledged actual manager of said company; that said Neilsen being discharged as said superintendent and manager, the personal control of said mine was then, by direction of said Steinfeld, placed in said J. N. Curtis, as the president of said Neilsen Mining and Smelting Company, and that said J. N. Curtis, as such president of said company, continued to advise said Steinfeld of the necessity of purchasing said adjoining properties and of acquiring the title thereto, in order that the company might benefit by the ownership thereof, both by way of acquiring the ore bodies that might run into said other adjoining mines and by virtue of its having one entire group of mines to sell as one property for one entire price; that, as above alleged, at the time of the closing down of said mines, the said mines were paying a profit of not less than five hundred (\$500.00) dollars per day, or fifteen thousand (\$15,000.00) dollars per month, and said mines were closed
- 573 down by said Albert Steinfeld solely and exclusively, as above alleged, for the purpose of enabling him (as the agent or representative of the Neilsen Mining and Smelting Company) to acquire said English group of mines and the Volkert and Francis titles thereto, and of getting rid of said Carl Neilsen;

That thereupon, and on or about the 29th day of June, 1900, said Albert Steinfeld, as such agent or representative of and for the benefit of the said Neilsen Mining & Smelting Company, purchased from the said Carl Neilsen the said three hundred (300) shares of stock belonging to said Carl Neilsen, and purchased from said Carl Neilsen and one Lewis two certain mines and all mines and mining claims that said Carl Neilsen might have in the mining district in which were located said Mammoth, or Old Boot mine, said mining district being known as the Silver Bell Mining District that the pur-

chase price he paid for said two mines and mining properties and said three hundred shares of stock was the sum of two thousand (\$2,000.00) dollars cash, and the sum of ten thousand (\$10,000.00) dollars, to be paid out of the proceeds of the working

574 of said Old Boot, or Mammoth mine, or the proceeds of the sale of the mine, in the event the same should be sold, before said sum should be paid out of the proceeds derived from the sale of said mine; that said contract between said Steinfeld and said Neilsen was prepared on the direction of said Steinfeld by one S. M. Franklin, the attorney for said Neilsen Mining and Smelting Company, and the same, on the direction of the said Albert Steinfeld, was signed by himself individually and by said Neilsen Mining and Smelting Company, and in and by which contract the said Albert Steinfeld and the said Neilsen Mining and Smelting Company contracted and agreed to pay said Carl Neilsen said further sum of ten thousand dollars out of the proceeds of the working of said mine, or, in the event the same was not thus paid before sale, then out of the proceeds of the sale of said mine. And said sum of ten thousand dollars was paid by said Steinfeld to Mary Neilsen, the successor of Carl Neilsen and one of the parties to said contract, out of the proceeds of the sale of said mine derived from said Imperial Copper Company, as herein alleged;

575 that upon the closing down of said mine and in the spring of 1901, said Albert Steinfeld, as such agent or representative of and for the benefit of the said Neilsen Mining and Smelting Company, purchased from said Francis and said Volkert their interest in said entire group of mines, paying them therefor the sum of twenty-five hundred (\$2500.00) dollars, and entering into a further contract with said parties to pay to them the further sum of twelve thousand five hundred dollars (\$12,500.00) out of the proceeds of the sales of said mines, in the event the same were sold, and which said sum of twelve thousand five hundred dollars was paid by said Albert Steinfeld to said Francis and Volkert out of the proceeds received from said Imperial Copper Company for the sale of said mines described in Schedule A hereto attached; that thereupon said Albert Steinfeld proceeded to England and there consummated the purchase of the titles to said English group of mines, including the purchase of the equitable, as well as the legal title thereto, paying therefor the sum of five thousand (\$5,000.00) dollars; that said sum of five thousand dollars, so paid for said

576 English group of mines, and said sum of twenty-five hundred dollars, so paid to said Francis and Volkert, were amounts much less than said mines could possibly have been purchased for, if the owners of said English group of mines had become possessed of the knowledge which said Albert Steinfeld had acquired, as above alleged, of the tendency of the ore bodies in said Mammoth, or Old Boot mine and that said Albert Steinfeld was enabled to purchase said mines at said reduced price solely and wholly because of the fact that said mines were shut down and said workings thereon stopped, to the great loss and damage of said Neilsen Mining and Smelting Company; that after acquiring said titles

to said mines, said Albert Steinfeld directed that the said Mammoth or Old Boot mine be again put in operation and again worked, which said direction was in the fall of the year 1900; that by said time the price of copper had so depreciated that the profits that could be derived from the workings of said Old Boot mine were very much less than at the time said mine was closed down by said

Steinfeld, as above alleged, and, in consequence thereof,
577 said Neilsen Mining and Smelting Company sustained a great damage, in fact, a damage far in excess of the price paid by said Steinfeld for said mines.

That immediately upon acquiring said two mines from said Neilsen and Lewis and said English group of mines, said Steinfeld turned same over to the possession of the said Neilsen Mining and Smelting Company, prior to the month of December, 1900, and said Neilsen Mining and Smelting Company thereupon assumed the possession thereof and the control thereof and at all times thereafter, by the consent and with the knowledge of said Albert Steinfeld, treated said mines as its own, and in the month of December, 1900, said Neilsen Mining and Smelting Company performed the annual assessment work on said mines required by the laws of the United States to be performed on all mines for the year 1900, and thereafter performed said assessment work on said mines for the year 1901 and the year 1902, all expenses of said assessment work being paid by said Neilsen Mining and Smelting Company, by and

on the direction of said Albert Steinfeld, the money there-
578 for being furnished and loaned to said Neilsen Mining and Smelting Company by said L. Zeckendorf & Company, by said Albert Steinfeld, the manager thereof, the same being charged on the books of said L. Zeckendorf & Company by and on the direction of said Albert Steinfeld, as its manager, to said Neilsen Mining and Smelting Company, the said indebtedness was thereafter paid out of the proceeds of said sale to said Imperial Copper Company; that all development work that was done on any or all of said so-called English group of mines was done by said Silver Bell Copper Company, by and with the knowledge of said Albert Steinfeld and on his direction and by and with money furnished and loaned to said Silver Bell Copper Company by said L. Zeckendorf & Company, by said Albert Steinfeld, as its manager, the same being charged on the books of said L. Zeckendorf & Company to said Silver Bell Copper Company, and the same was thereafter paid by said Silver Bell Copper Company to said L. Zeckendorf & Company by said Albert Steinfeld, as the Treasurer of said
579 Silver Bell Copper Company, out of the proceeds of the sale of said mines to said Imperial Copper Company.

That said J. N. Curtis, as president of said Silver Bell Copper Company, upon said mines being turned over, as aforesaid, to said Silver Bell Copper Company, prepared various maps for and under the direction of said Albert Steinfeld, showing all of said mines described in said Schedule A, hereto attached, as one property and one entire group of mines and as the mines and properties of said Silver Bell Copper Company, and said J. N. Curtis, as the pres-

ident of said Silver Bell Copper Company, on the direction of said Albert Steinfeld, prepared various reports of all the properties of said Silver Bell Copper Company and included in said reports the said English group of mines as being properties of said Silver Bell Copper Company, and that said J. N. Curtis, as the president of said Silver Bell Copper Company, on the direction of said Albert Steinfeld, credited said Albert Steinfeld with all the money which he had paid to said Volkert, to said Neilsen and to the holders of said English titles, and credited him with one per cent per month interest on such sums, and said credit in favor of said Albert Steinfeld

580 feld on the books of said Silver Bell Copper Company was made by and on the direction of said Albert Steinfeld; that included in said credit said Albert Steinfeld caused said Silver Bell Copper Company to credit him with all expenses of said trip to England, including the expenses of his son and the expenses of himself and his son to various places on the continent of Europe, taken at the same time and in no way connected with said trip to England for the purpose of purchasing said mines, and caused himself to be credited with all moneys paid by him, or on account of or in any manner connected with the purchase of said mines; that all said sum of money, with interest thereon from the dates of payments thereof, at one per cent per month, on the 20th of May, 1903, amounted to the sum of eighteen thousand one hundred and seventeen (\$18,117.00) dollars, and is the eighteen thousand one hundred and seventeen dollars said Albert Steinfeld paid to himself out of the proceeds of the sales of said mines to said Imperial Copper Company; that said credit, or charge, on the books of said Silver Bell Copper Company, so made by said J. N. Curtis, was

581 made in the month of May, 1901, on the written order and direction of said Albert Steinfeld and by writing signed by him, in and by which he stated that said moneys, so paid by him, were paid as an advance to and for the use and benefit of said Silver Bell Copper Company; that thereafter and in the month of July, 1901, said J. N. Curtis, president of said Silver Bell Copper Company, with S. M. Franklin, the attorney of said Silver Bell Copper Company, went to said Albert Steinfeld and stated to him that they understood he was claiming said English group of mines as his own, and thereupon he, said Franklin and said Curtis, as the attorney and president representing said Silver Bell Copper Company, stated to said Steinfeld that he held said properties in trust for said Silver Bell Copper Company, and that he could not hold the same for himself, and said Franklin, the attorney for said Silver Bell Copper Company, then stated to said Steinfeld that he would be obliged to continue to hold said properties in such form until his actions were either ratified or disaffirmed by a board of directors not controlled

582 by him, or at a stockholders' meeting, when all of the stock was voted by persons competent to vote thereat, and who were not controlled by said Albert Steinfeld, and said Albert Steinfeld thereupon, and on said demand and statement being made by said Franklin and said Curtis agreed to the fact that he held said properties in trust for said Silver Bell Copper Company,

and that all he desired was a repayment to him of the moneys which he had advanced and which he has theretofore caused said Curtis to credit to him on the books of said Silver Bell Copper Company, and then and there agreed that he would continue to hold said properties in trust for said Silver Bell Copper Company until his action in purchasing the same was disaffirmed or affirmed by the stockholders of said Silver Bell Copper Company, at which all of the stock should be voted by persons competent to vote the same; that no such meeting was ever held and the action of said Steinfeld was never disaffirmed; on the contrary, the same was affirmed and ratified; that in the month of June, 1903, while said Steinfeld held said four promissory notes and a portion of said one hundred and fifteen thousand (\$115,000.00) dollars, first installment, cash payment, in his hands as the treasurer of said Silver Bell Copper Company, said Steinfeld stated in a letter addressed to this plaintiff that he had always held said properties in trust for said Silver Bell Copper Company, and that he had advanced said money for the use and benefit of said company, and that he had advanced and paid to said Neilsen said two thousand dollars for said company.

That said Steinfeld, at divers and different times during the year 1900 before purchasing said English group of mines, by letters to this plaintiff and to said J. N. Curtis, the president of said Silver Bell Copper Company, stated, in effect, that he was going to purchase the same for the Neilsen Mining and Smelting Company, or the Silver Bell Copper Company, or for its use and benefit; that in the month of March, 1901, said Albert Steinfeld called upon said J. N. Curtis to prepare a written report of "the mines and mining properties of the Silver Bell Copper Company," and that on the 24th day of March, 1901, and pursuant to said request, said J. N. Curtis, as the president of said Silver Bell Copper Company, delivered to said Albert Steinfeld a written report and statement, particularly describing the properties of the Silver Bell Copper Company, in which written report he, the said J. N. Curtis, included by description all of the said English group of mines; that said Albert Steinfeld, in said month of March and in the month of April, 1901, circulated said written report and delivered copies thereof to various and different people and to this plaintiff, as being a correct report of the mines and mining properties of said Silver Bell Copper Mine; and that thereafter and at various and different times said Albert Steinfeld furnished to this plaintiff written reports of the properties of said Silver Bell Copper Company; and that the three hundred shares of stock purchased by said Albert Steinfeld, as in this amended complaint alleged, from said Carl Neilsen, as trustee, was always held by him as trustee for the use and benefit of said Silver Bell Copper Company; and

That at various and divers times during the years 1901, 1902, and the spring of 1903, said Albert Steinfeld has given options on all of said mines described in said Schedule Exhibit A, hereto attached, for one entire purchase price, said price being named in various sums, with no suggestion to any officer or mem-

ber of said Silver Bell Copper Company that any part or portion of said price other than said sum of eighteen thousand one hundred and seventeen dollars, was to come to him, said Albert Steinfeld, except as a dividend on whatever stock he might own in said Silver Bell Copper Company; and that at no time was there ever a suggestion on his part that there was to be any division of any of said purchase price; that during all said time said J. N. Curtis, as the president of said Silver Bell Copper Company, frequently notified said Albert Steinfeld that said Old Boot Mine, or Mammoth Mine, was itself worth a sum far in excess of the sum of five hundred and fifteen thousand dollars; in fact, said J. N. Curtis, as president of the said Silver Bell Copper Company, before the purchase of said English group of mines, notified said Albert Steinfeld that the said Old Boot, or Mammoth mine, and the other properties belonging to said Silver Bell Copper Company were worth the sum of seven hundred and fifty thousand (\$750,000.00) dollars; that in the month of April, 1903, said Albert Steinfeld without consultation
586 with any officer of the Silver Bell Copper Company, fixed the price of five hundred and fifteen thousand dollars on said entire group of mines and all said properties, including all mining properties belonging to said Silver Bell Copper Company, and including all mines and properties standing in the name of said Albert Steinfeld, or of said Mammoth Copper Company, in said Silver Bell Mining District, which, in addition to the mines standing in the name of said Silver Bell Copper Company, would include the mines standing in the name of said J. N. Curtis, and said English group of mines standing in the name of said Albert Steinfeld, or said Mammoth Copper Company, and said two mines so purchased from said Neilsen and Lewis, standing in the name of said Albert Steinfeld; that said purchase price of five hundred and fifteen thousand dollars for all of said properties was fixed by Albert Steinfeld without any suggestion on his part that any part or portion thereof was claimed, or would be claimed, by him, except the said sums so expended by him for the purchase of said mines, and which he had caused to be charged to said Silver Bell
587 Copper Company as advances made to or for it and its use and benefit, and on which he was charging said Silver Bell Copper Company interest; that on the 13th day of May, 1903, said Albert Steinfeld reported to the board of directors of said Silver Bell Copper Company, he being one of said board, that he had given an option to one C. A. Beaton on all of the company's property, for the purchase price of five hundred and fifteen thousand dollars, and requested that his action in so doing be confirmed, and thereupon and upon the request of said Albert Steinfeld, he voting therefor, his action in giving said option for said purchase price was confirmed; that the option to said Beaton was taken by him for said Imperial Copper Company and the sale thereafter consummated to the Imperial Copper Company to all the properties described in said Schedule A, hereto attached, was under and by virtue of said option and for the purchase price of five hundred and fifteen thousand dollars named therein; that said sale was consummated on the

20th day of May, 1903; that negotiations of and concerning said sale were continuous from the time of the giving of said option to said Beaton down to and including the payment of the first
588 installment of the purchase price to said Albert Steinfeld as the treasurer of the said Silver Bell Copper Company and the delivery to him of the four promissory notes herein in this amended complaint mentioned, all being paid and delivered to him as the treasurer of the Silver Bell Copper Company, as and for the purchase price of all of the properties described in said Schedule A, hereto attached, and said first installment of cash and four promissory notes were received by said Albert Steinfeld as treasurer of said Silver Bell Copper Company, and as its property; that said Albert Steinfeld personally conducted said negotiations, by and on behalf of said Silver Bell Copper Company, with said Imperial Copper Company and said Beaton and the attorneys of said Imperial Copper Company, and caused S. M. Franklin, the attorney for said Silver Bell Copper Company, to take part in said negotiations and to assist in the preparation of all contracts and papers, and to do other work in connection with said sale, said S. M. Franklin during all said negotiations acting as the attorney of
589 said Silver Bell Copper Company; that after the consummation of said sale and after the deed of said Silver Bell Copper Company to said mines had been executed, and after all papers had been executed and delivered to said Imperial Copper Company that were delivered to it in connection with said deal, and after said Imperial Copper Company had paid to said Albert Steinfeld, as the treasurer of said Silver Bell Copper Company, the first installment cash payment on said purchase price, and had delivered to him the four promissory notes making up the balance of said purchase price, the directors of said Silver Bell Copper Company adopted and caused to be spread upon its minutes, under date of said May 20th, 1903, the following resolutions, to-wit:

"Present: J. N. Curtis, president; Albert Steinfeld, director; R. K. Shelton, director.

"The president reported that the negotiations for the sale of the properties of this corporation had been concluded. That the Imperial Copper Company, as the nominee of George A. Beaton, had agreed to purchase all mining claims of this company in the Silver
590 Bell Mining District, Pima County, Arizona; and all the plant and personal property used therewith also all the machinery, plant and personal property used therewith; also all of the mining claims and personal property used therewith of the Mammoth Copper Company, as well as certain other mining claims or interests therein which stand in the name of Albert Steinfeld and in the individual name of the president, and to pay therefor the sum of \$515,000, as follows: The sum of \$115,000 in cash, which sum it did pay, and is now in the hands of Albert Steinfeld, treasurer, and the balance, \$400,000, in four equal installments of \$100,000 each, payable in three, six and nine and twelve months from this date, with interest thereon until paid at 6 per cent per annum; and for which deferred payment said company executed

to this company its four promissory notes, which are also in the hands of the treasurer.

"He further reported that the necessary deeds and agreements had been executed by the president and secretary of this company and amongst others a guarantee agreement which guarantee agreement was also signed and executed by the Mammoth Copper
591 Company and by said Albert Steinfeld individually. The said agreements were read and considered.

"He further reported that the deeds so executed had been placed in escrow with the Phoenix National Bank of Phoenix, subject to certain escrow instructions, a copy of which escrow instructions were produced and read.

"He further reported that Mr. Albert Steinfeld, who had conducted the negotiations with the Imperial Copper Company, had again submitted for acceptance the proposition which he had heretofore submitted in writing on July 15, 1901, with the modifications, however, that this company shall pay to him forthwith in cash the sums of money, which in said proposition were required to be paid on October 15, 1901, to-wit: The sum of \$15,192.45 and also shall forthwith pay in cash, interest thereon from October 15th, 1901, to this date, at the rate of 1 per cent per month, amounting to \$2,924.55, making a total of \$18,117.00, and that this company shall also assume and pay all obligations which he, said Steinfeld, has incurred in conducting the negotiations and in making the sale of said mining
592 claims and property to the Imperial Copper Company and keep him free and harmless from any and all expenses and loss which may arise by reason of any claim or asserted claims, of any person whatsoever, for or on account of or arising out of or connected with present sale and negotiations of any past negotiation or transaction in regard to said mining claims or any of them. And particularly that this company shall assume and pay unto N. O. Murphy the commissions which he, said Steinfeld, agreed to pay to said Murphy, to-wit: the sum of \$25,000, said agreement being made for and on behalf of this company and also shall keep him harmless from loss, damage or expense, by reason of the asserted claim of one J. M. Burnett for commission.

"Also that this company shall indemnify him against loss, damage and expense, by reason of his having guaranteed the titles to the mining claims sold or agreed to be sold to said Imperial Copper Company, as is set forth in the guarantee agreement heretofore submitted to this meeting.

"The president also stated that it was necessary to adjust
593 with the Mammoth Copper Company the disposition that was to be made of the purchase money upon the sale.

"He then submitted the agreement between this company, the said Mammoth Copper Company, and Albert Steinfeld, on this point, and also covering the matter of guarantee."

After a full consideration the following resolutions were unanimously adopted, to-wit:

"Resolved, That all of the acts of the president and secretary of this corporation, and all papers, agreements and deeds signed by

them for or on behalf of this corporation in the matter of the negotiations and sale by this company's property to the Imperial Copper Company, be, and the same hereby are, ratified, approved, and confirmed.

"Resolved, That the proposition of Albert Steinfeld as herewith submitted be, and the same hereby is accepted, and that he, said Steinfeld, be forthwith paid by this corporation the sum of eighteen thousand one hundred and seventeen dollars (\$18,117.00) and out of the first moneys received by this company on the promissory notes of the Imperial Copper Company, he, said Steinfeld, as treasurer of this company, shall retain sufficient moneys to pay the amount necessary to be paid to Margaret Francis and Julius H. Volkert under the agreement with them aforesaid; and to pay to the assigns or legal representatives of Carl S. Neilsen (he being now deceased) and to Mary Neilsen, the amount necessary to be paid under the agreement with said Neilsens aforesaid; and, when said amounts respectively become due, to pay the same to the parties entitled thereto.

"Resolved, That the president and secretary of this corporation be, and they are hereby authorized, empowered and directed, in such manner or form as they deem necessary or proper, to indemnify said Steinfeld against all loss, damage and expense that may arise to him by reason of his having guaranteed the titles to the properties so sold, or agreed to be sold to the said Imperial Copper Company and that he, and they hereby are authorized, empowered and directed to do or cause to be done all things, and to execute all papers, documents or other writings, which they deem necessary in the premises.

594 "Resolved, That Albert Steinfeld, as treasurer of this company, be and he is hereby authorized to pay to N. O. Murphy whatever commissions may be coming to him.

"Resolved, That the agreement this day made by the president and secretary of the corporation with the Mammoth Copper Company and Albert Steinfeld, in regard to the disposition of the proceeds of the sale this day made to the Imperial Copper Company, and indemnifying said Steinfeld, be, and the same is hereby ratified, approved and confirmed."

That said Albert Steinfeld was present and voted at said meeting and signed the minutes thereof as a director.

IV.

"That on and prior to the 20th day of May, 1903, and at the time of the making of the sales by the said Silver Bell Copper Company, hereinafter alleged and set out, said Silver Bell Copper Company was the owner of certain properties in the Silver Bell Mining District, County of Pima, Territory of Arizona, listed and scheduled in Exhibit A hereto attached; that prior to the said 20th day of May, 1903, said Albert Steinfeld, in his own name and in the name of the said Mammoth Copper Company, had purchased certain of the said properties listed and scheduled in said Exhibit A,

596

the same being purchased, however, in trust for and for the use and benefit of said defendant, Silver Bell Copper Company.

That said Steinfeld had expended in the purchase of said properties and of the said 300 shares of stock from said Carl Neilsen a certain sum of money, which, with interest thereon, from the date of the expenditure to the 20th day of May, 1903, at the rate of one per cent per month, would amount, on the said 20th day of May, 1903, to the sum of \$18,117.00; that prior to said 20th day of May, 1903, the said Steinfeld in his own name and in the name of said Mammoth Copper Company, had offered to said Silver Bell Copper Company, in writing, that said properties would be conveyed to said Silver Bell Copper Company, upon said Steinfeld being paid back the amount of such expenditure, with interest thereon, as aforesaid, the said Silver Bell Copper Company, in consideration thereof, to pay for the assessment work to be done on said properties; that said Silver 597 Bell Copper Company, after the receipt of said offer, did pay all the annual assessment work required to be done on said properties, and from time to time expended large sums of money in the development of said properties so standing in the name of said Albert Steinfeld and said Mammoth Copper Company, the said Silver Bell Copper Company at all times after the purchase of said properties by said Steinfeld as aforesaid, being in possession of and in the use and occupancy of the said properties.

That on said 20th day of May, 1903, and prior to the making of the sale hereinafter set out and alleged, said Albert Steinfeld (he being the owner of all of the stock of the said Mammoth Copper Company) presented to the said defendant, the said Silver Bell Copper Company, the renewal of said offer to transfer said properties so standing in his name and in the name of the said Mammoth Copper Company, upon his (the said Steinfeld) being paid the sum of \$18,117.00, which said offer on the part of said Steinfeld, by resolution of the board of directors of said Silver Bell Copper Com- 598 pany, entered in the minutes of said corporation, was then and there accepted by said Silver Bell Copper Company, said Steinfeld as a member of said board voting in favor of the adoption of said resolution and of the acceptance of said offer and tender; that no separate transfer or conveyance was made by said Albert Steinfeld or said Mammoth Copper Company of any of said properties to said Silver Bell Copper Company, but on said 20th day of May, 1903, the said Silver Bell Copper Company sold all of the properties listed and described in said Schedule and Exhibit A, to the Imperial Copper Company, for the agreed price of \$515,000.00 gold coin of the United States, payable as hereinafter stated, the said Albert Steinfeld and the said Mammoth Copper Company joined with the said Silver Bell Copper Company in the deed of conveyance of said properties to said Imperial Copper Company; that said Albert Steinfeld and Mammoth Copper Company joined in said deed simply and for the purpose that the legal title to any of said properties which might be standing in the name of both or either of said parties, should be conveyed and transferred to

599 said Imperial Copper Company, it being then and there agreed, however, by and between the said Silver Bell Copper Company, the said Imperial Copper Company and the said Steinfeld that the said \$515,000.00 purchase price of said properties was the property of the Silver Bell Copper Company, and that all cash and notes representing said purchase price or installments thereof, as hereinafter stated, were the property of said Silver Bell Copper Company; that the said purchase price of \$515,000.00 under and by virtue of said contract with the said Imperial Copper Company, became payable as follows: \$115,000.00 in cash on said 20th day of May, 1903, and \$400,000.00 in four equal payments of \$100,000.00 each, due respectively in three, six, nine and twelve months after said 20th day of May, 1903, each of said payments being represented by a promissory note executed by the Imperial Copper Company for \$100,000.00 principal, to the order of, and payable to the Silver Bell Copper Company, each of said notes being dated the 20th day of May, 1903, bearing interest from said date to the date of the payments thereof, at the rate of 600 six (6) per cent per annum; that said sum of \$115,000.00 in cash was paid by said Imperial Copper Company to said Albert Steinfeld, as the treasurer of and for the said Silver Bell Copper Company; that said Albert Steinfeld, out of said sum, paid to himself the said sum of \$18,117.00, the amount, as heretofore stated, of the expenditures theretofore made by him in the acquiring of certain of said properties and said stock, with the interest thereon from the date of payment thereof by said Steinfeld to the said 20th day of May, 1903, at the rate of one per cent per month, that after the said 20th day of May, 1903, and prior to the first day of January, 1904, said Imperial Copper Company paid two of said promissory notes, paying the principals thereof with the interest at the said rate of six per cent per annum on said principal up to the respective dates of payment, making a total of cash paid to the said Silver Bell Copper Company prior to January 1, 1904, for and on account of said purchase and sale of said properties so listed and scheduled in said Exhibit A, of the sum of \$319,487.50; that the said sums of money, aggregating the said sum of \$319,487.50, were received by the said Silver 601 Bell Copper Company from said Imperial Copper Company as and for the first cash payment, and as the payments of the two promissory notes first falling due on the said purchase price of said sale so made by said Silver Bell Copper Company to said Imperial Copper Company, and all of the said money not now on hand and in the possession of said Silver Bell Copper Company was paid out and disbursed by the said Silver Bell Copper Company under the direction, management and control of the said Albert Steinfeld or by the said Albert Steinfeld personally while he held in his possession, as the treasurer of said company, the first installment cash payment above alleged and set out, which said expenditures so made by said Albert Steinfeld as aforesaid, were not made on any prior order of the board of directors of said Silver Bell Copper Company, though all of said payments were thereafter ratified except as herein stated, by said board upon said Steinfeld submitting to said board the state-

ment in writing of the said expenditures so made by him. That of said sum there was paid out for and on account of certain debts and contracts of the Silver Bell Copper Company, a total
602 of about \$118,000.00, and to the said Albert Steinfeld as aforesaid the said sum of \$18,117.00, which last mentioned sum the said Albert Steinfeld personally and individually, and for his own use and benefit, received of and from the said Silver Bell Copper Company, as a full payment of all sums whatsoever that might be due or owing from said Silver Bell Copper Company for or on account of any or all interests that the said Steinfeld and the said Mammoth Copper Company, or both, had or might have in or to any of the said properties, so listed and scheduled in said Exhibit A, and so sold and conveyed to said Imperial Copper Company, and of the \$2,000.00 so advanced for said Silver Bell Copper Company to said Carl Neilsen and said Lewis, as aforesaid, and in accepting said sum of \$18,117.00 as aforesaid, said Steinfeld, for himself and for said Mammoth Copper Company, thereby released and relinquished to the said Silver Bell Copper Company any and all interests either or both might have or did have in or to any of said properties so listed and described in said schedule Exhibit A, and satisfied and paid all indebtedness that was owing to him, said Steinfeld, for moneys advanced to and for said Silver Bell Copper Company as herein
603 alleged.

V.

That after the completion of the sale aforesaid and after the receipt by said Silverbell Copper Company of said sum of \$115,000.00, and interest, the said Albert Steinfeld, Mammoth Copper Company and Silver Bell Copper Company, on or about the 26th day of May, 1903, and not earlier than May 25th, 1903, executed a memorandum in writing, dated May 20th, 1903, denominated an agreement, in and by which the said parties recited, over their own signature, that all of the proceeds of said sale, including the said notes and the said cash, were the property of the said Silver Bell Copper Company, and that the said Albert Steinfeld and the said Mammoth Copper Company had no interest whatever therein; that said memorandum in writing purported to give to said Albert Steinfeld the sole custody of said money and notes and of the proceeds thereof for one year
604 thereafter; that a copy of the said memorandum so signed by the said parties was spread upon the minutes of a meeting of the said board of directors of said defendant corporation, the Silver Bell Copper Company, held after the 24th day of May, 1903, and on or about the 26th day of May, 1903, the minutes of said meeting, however, being incorrectly dated the 20th day of May, 1903, in order thereby to indicate that said meeting was held on said date, when in truth and in fact it was not so held, as hereinabove alleged. That said Albert Steinfeld acted as a director at said meeting and controlled, directed and managed the other two directors acting with him.

That under date of the 26th day of December, 1903, but whether on said date or at a latter date this plaintiff does not know, the said

defendants, Shelton, Steinfeld and Curtis, purported to hold a meeting as a board of directors of said Silver Bell Copper Company, and to act as directors of the said defendant corporation, and at such meeting and so acting purported to pass a resolution wherein and whereby the said Silver Bell Copper Company purported to rescind the said memorandum or so called agreement, dated May 20th, 1903, a copy of which resolution was spread upon the minutes of said meetings aforesaid, but as this plaintiff is informed and believes and so alleges, said board did not attempt to and did not rescind any other of the transactions of said meeting, held on or about May 20th, 1903, entered in the minute book as being held on May 20th, 1903, and particularly did not purport to or attempt to and did not rescind the transaction by which the defendant, the Silver Bell Copper Company, repaid to and reimbursed the said Albert Steinfeld, and the said Albert Steinfeld received from the said company, the said sum of \$18,117.00; that any action or purported action on the part of said board of directors, except with reference to the custody of said money and funds, was not consented to by this plaintiff, and this plaintiff has not consented to or ratified the same, and because of the facts in this amended complaint alleged, and particularly because of the fact that neither said Curtis, said Shelton or said Steinfeld, for the reasons herein alleged, was competent to act as a director of said Silver Bell Copper Company in any transaction or dealing with said Albert Steinfeld, the same are not binding on said corporation; that this plaintiff had no knowledge of the action of said board of directors, so taken on the said 26th day of December, 1903, until after the 21st day of January, 1904; and had no knowledge that said board of directors had held or had attempted to hold any meeting on or under said date of December 26th, 1903, until after January 21st, 1904; that prior to any attempted meeting of said board of directors, on said 26th day of December, 1903, a meeting of the stockholders of said company was held, at which this plaintiff was present, at which meeting it was agreed and understood that the contract, in so far only as it affected the custody and control of said money, so entered into under said date of May 20th, 1903, should be rescinded, and that all of the money and property received from the sales of said Silver Bell Copper Company and so in the hands of said Albert Steinfeld should be turned over by him to J. N. Curtis, who had, in the meantime, been elected treasurer as well as president of said Silver Bell Copper Company; and said Albert Steinfeld did thereupon turn said money and said property over to said J. N. Curtis as the treasurer of said Silver Bell Copper Company, and as its property, under and by virtue of the actions taken at said stockholders' meeting, and the same was thereafter held by said J. N. Curtis as such treasurer, as the property and money of said Silver Bell Copper Company, until the wrongful disbursement and payment of the same, as in this amended complaint alleged; that the only matters discussed at said stockholders' meeting was the question of the custody of said money and the holding thereof by said Albert Steinfeld, as an indemnity to him for and on account of his guarantee to said Imperial Copper

Company on the contracts entered into with said Imperial Copper Company on said 20th day of May, 1903; that at said time and at said stockholders' meeting, Mr. Eugene S. Ives, an attorney at law and representing said Albert Steinfeld as his attorney, was present and presented to said meeting the following resolutions as being resolutions adopted at said meeting held under said date of 608 the 20th day of May, 1903, to-wit:

"Resolved, That the agreement this day made by the president and secretary of this corporation with the Mammoth Copper Company and Albert Steinfeld in regard to the disposition of the proceeds of the sale this day made to the Imperial Copper Company, and indemnifying said Steinfeld, be and the same is hereby ratified, approved and confirmed."

"Resolved, That the president and secretary of this company be, and they are hereby authorized, empowered, and directed, in such manner or form as they deem necessary or proper, to indemnify the said Albert Steinfeld against all loss, damage and expense that may arise to him by reason of his having guaranteed the titles to the property so sold or agreed to be sold to the said Imperial Copper Company, and that he and they be hereafter authorized, empowered and directed to do or cause to be done all things and to execute all papers, documents which they may deem necessary in the premises."

That no reference was made in said meeting to any other 609 resolution than said two resolutions above set out; and all discussion and acts taken at said meeting were intended to refer to said resolutions only and not to any other resolution or resolutions adopted or passed at the meeting held under date of May 20th, 1903, as hereinbefore alleged and set out.

And that at said stockholders' meeting it was voted to rescind said resolutions above set out and said contract of May 20th, 1903, and no other or different contract or resolutions, and if the action taken at said stockholders' meeting had the effect, on its face, of rescinding any other resolutions or any other contract adopted on said 20th day of May, 1903, or under date thereof, particularly the contract entered into by the acceptance of said offer of Albert Steinfeld as to the payment to him of said sum of \$18,117.00 and the payment thereof, such action was a mistake on the part of this plaintiff and was not intended as such, and was a mistake on the part of the other stockholders of said company present at said meeting, and was not intended as such; that thereafter and 610

without further action whatsoever by the said Silver Bell Copper Company, and without any stockholder of the said company other than the said Curtis Steinfeld and Shelton, having any knowledge whatsoever thereof, or of such intended action, on or about the 16th day of January, 1904, the said Steinfeld, Curtis and Shelton, purporting to act as a board of directors of said corporation, purported to adopt and pass a resolution, and caused the same to be spread upon the minute book of said corporation, wherein and whereby the said parties so acting as aforesaid recited the fact that Albert Steinfeld and the said Mammoth Copper Company claimed that their interest in the properties conveyed as here-

inbefore set out, by the said Silver Bell Copper Company to the said Imperial Copper Company, were of greater value than were the interests of the said Silver Bell Copper Company therein, and that the said Albert Steinfeld was the sole and only stockholder of said Mammoth Copper Company, as hereinbefore alleged, and therefore was the practical owner thereof, claimed that they were

entitled to more than one-half of the said purchase price of
 611 \$515,000.00 so received by the said Silver Bell Copper Company, from the said Imperial Copper Company, and thereupon the said Steinfeld, Curtis and Shelton at said purported meeting and purporting to act as the board of directors of said corporation, and as an act prepared by and for said Albert Steinfeld, and at his request and on his direction, further resolved that the said Silver Bell Copper Company should pay to the said Albert Steinfeld personally and for his own individual use and benefit, one-half of the said cash already received, less one-half of the sum of \$28,000.00, theretofore paid by the said Silver Bell Copper Company as commissions and expenses in connection with the making of said sale, and that the said Silver Bell Copper Company should also, at the same time, deliver or cause to be delivered to the said Albert Steinfeld, one of the two promissory notes belonging to said corporation, still remaining unpaid and still in the hands of the corporation, and that said Albert Steinfeld should retain as his own the sum of \$25,750.00, being one-half of the sum of \$51,500.00 still in his hands belonging to the

said Silver Bell Copper Company and garnisheed by one
 612 Franklin as its property, that thereupon said J. N. Curtis, being then the treasurer of said Silver Bell Copper Company, and as such having in his possession the cash, and under his control the notes hereinafter mentioned, and under no other authority or claimed authority than as hereinbefore set out, paid to the said Albert Steinfeld of the said funds of the said Silver Bell Copper Company then on hand, the sum of \$145,743.75, in cash (the same being one-half of said sum of \$319,487.50, less the said sum of \$28,000.00) and delivered or caused to be delivered to said Albert Steinfeld one of said notes, and which said funds and note said Albert Steinfeld received from said Curtis, the treasurer of said Silver Bell Copper Company.

The said note so delivered to said Albert Steinfeld at the time of such delivery was worth the full amount of the principal and interest thereof, viz: \$100,000.00, with interest thereon from the 20th day of May, 1903, to the 20th day of January, 1904, at the rate of six per cent per annum, and said Steinfeld collected said full sum thereon.

That said Steinfeld also retained the said sum of \$25,-
 613 750.00 still remaining in his hands as aforesaid, and thereupon converted the same and said sum of \$145,743.75 and said note so delivered to him as aforesaid and the proceeds thereof to his own use and benefit, and not for or to the use or benefit of any other person, firm or corporation, except J. N. Curtis, as hereinafter alleged, and has ever since and does now retain the same, and has not, nor has any part thereof ever been paid back to the Silver Bell

Copper Company or returned to it, and nothing whatever on account thereof has ever been paid to said corporation or for it, but the whole remains unpaid; that except as hereinafter specifically alleged, said Albert Steinfeld collected on said note prior to the commencement of this action the sum of \$103,967.00, which, with said sum of \$25,750.00 and said sum of \$145,743.75, makes a total sum of \$275,460.75, and all of which said Albert Steinfeld, before the commencement of this action, had taken, received and used as his own property and not as the property of any other person, firm or corporation, thereby converting said sum to his individual use and benefit and not to the use and benefit of any other person, firm or corporation, except as herein specifically alleged and set out.

VI.

That the Board of Directors of the said Silver Bell Copper Company, still acting under the management and still controlled by the said Albert Steinfeld, subsequent to the said 10th day of January, 1904, and prior to the 16th day of January, 1904, caused to be sold the other of the said two promissory notes remaining unpaid, receiving thereon, on account of the principal and interest, a total of \$103,967.00, which said sum was paid into the treasury of the Silver Bell Copper Company and deposited to its account in the banks of the City of Tucson, Territory of Arizona.

VII.

That on the 20th day of January, 1904, and at the time of the holding of the meeting next hereinafter alleged and set out, there remained on deposit in the hands of the said Silver Bell Copper Company and in the hands of its treasurer, a total of \$111,750.00, being all that remained of the said sum of \$515,000.00 after the misappropriation and wrongful diversion of the funds and property of the said corporation hereinabove alleged and set out; that thereupon, and on the 20th day of January, 1904, the said above named defendants, Steinfeld, Curtis, and Shelton, all acting under the control, management and direction of the said Albert Steinfeld and purporting to act as a board of directors of the said defendant, the Silver Bell Copper Company, passed a resolution wherein and whereby they purported to declare a dividend of \$111.00 per share on the full one thousand shares of the stock of the said Silver Bell Copper Company, including the said three hundred shares of stock hereinabove alleged and referred to standing in the name of said Albert Steinfeld, as trustee for the benefit and as the property of the said defendant corporation, the Silver Bell Copper Company, and thereupon, and on said 20th day of January, 1904, the said Albert Steinfeld, being solely in control of the said defendant corporation, the Silver Bell Copper Company, and of its officers and directors, caused said directors of said corporation and said Curtis as the treasurer thereof, to pay to him the said sum of \$33,000.00, being \$111.00 per share on said three hundred shares of stock, the property of said Silver Bell Cop-

per Company, as aforesaid, and the said Albert Steinfeld then and there received the said \$33,000.00 and then and there appropriated the same to his own individual use, and not to any use or benefit as security or otherwise of said Silver Bell Copper Company; and thereupon the said Albert Steinfeld caused to be issued to the said R. K. Shelton a check for \$111.00; that as part of the same transaction and under the agreement by which the said Shelton, Steinfeld and Curtis agreed to pass the resolutions declaring the said dividend and the resolutions of January 16th, 1904, it was agreed that there should be paid to the said Curtis the sum of \$111.00 per share on the one hundred and seventy shares standing in his name on the books of the company and thereupon there was paid to the said Curtis the sum of \$18,870.00, which said sum of money the said Curtis received from the said Silver Bell Copper Company and appropriated to his own use;

That the money so paid to the said Curtis and to the said 617 Steinfeld and Shelton as dividends aforesaid, were all paid, as this plaintiff is informed and believes and so alleges the fact to be, under the agreement and arrangement entered into at the time the said \$145,743.75 and the said note were turned over to the said Albert Steinfeld, as hereinbefore alleged and set out, and this plaintiff alleges on his information and belief, that at the time it was agreed between the said Steinfeld, Curtis and Shelton that there should be paid to the said Steinfeld the said sum of \$145,743.75, and that there should be turned over to him the said note, it was also agreed that there should also be declared the said dividend so that the said Curtis should receive the said sum of \$18,870.00 and that all of said acts were done under and as a part of one transaction, contract and arrangement, and this plaintiff is further informed and believes and so alleges the fact to be, that the said sum of \$18,870.00 was paid to the said Curtis as consideration to him for his agreeing that the said Steinfeld should be paid the said sums hereinabove set out and should receive the said note;

that plaintiff is informed and believes, and, on such information and belief, alleges the fact to be; that said Steinfeld, 618 out of the proceeds of said promissory note and of said cash so turned over to him, including said sum of \$33,000.00, paid to said Curtis the full share thereof that one hundred and seventy shares of stock bears to seven hundred shares, and that said Curtis, in fact, received from said Steinfeld the full proportion of said cash and notes that he would have received if said money and note had not been so diverted, and paid to said Steinfeld, but had been allowed to remain in the treasury of said Silver Bell Copper Company and disbursed as dividends on all of the stock thereof, and that said Curtis did not give up to said Steinfeld, as would appear from the reading of the record, a sum approximating \$72,000.00 and receiving only the sum of \$18,870.00, but that said Curtis received from said Steinfeld the full amount of \$90,000.00, or its equivalent, in consideration of his voting as a director on said 16th day of January, or at the meeting held under said date, for the delivery to said Steinfeld and said Mammoth Copper Company of said cash and said promissory note.

619

VII.

That this action is prosecuted by the plaintiff above named, as a stockholder of the said defendant, the Silver Bell Copper Company, and not otherwise, and that all of the sums of money expended by him as and for costs and attorneys' fees in the prosecution of this action are expended for the benefit of the said Silver Bell Copper Company, and not for the benefit of this plaintiff, except as he is a stockholder of said corporation; that this plaintiff, in that regard, has employed as the attorneys for the bringing of this action for the benefit of the said Silver Bell Copper Company, Edwin A. Meserve, of Los Angeles, California, and Messrs. Hereford & Hazzard, of Tucson, Arizona, and has agreed to pay the said attorneys reasonable fees for the services rendered in this action, and which said fees and all other expenses and obligations incurred by this plaintiff, in the bringing of this action, should be paid, to plaintiff, or to those to whom he is obligated therefor by the said defendant, Silver Bell Copper Company, out of the moneys which it may receive as the result of the bringing and prosecuting of this action.

620

IX.

That at all of the times above mentioned, when the above named Shelton, Curtis and Steinfeld were purporting to act as directors of the above named corporation, and, as such were purporting and attempting to divert from the funds of said corporation the above named sums of money so paid to the said Steinfeld, Shelton and Curtis, and at the times above alleged, when they were purporting to act for the said corporation and to cause said corporation to transfer to the said Steinfeld the said above mentioned promissory note, each and all of said parties well knew that neither the said Steinfeld or the said defendant, Mammoth Copper Company, had any right, title, interest or estate, at any time, in or to any of the said properties described in Schedule "A," hereto annexed, and well knew that neither the said Mammoth Copper Company, nor the said Albert Steinfeld had any right to any of the money or properties of the said Silver Bell Copper Company, except such as the said Albert Steinfeld might have been entitled to by reason of his ownership of the

621 two hundred and fifty shares of stock (being the two hundred and forty-nine shares standing in his name and the one share standing in the name of the said Shelton, as hereinabove set out) and each and all of the said parties well knew that the payment to the said Albert Steinfeld of the said sums of money hereinabove set out and the delivery to him of the said note were in violation of the rights of the said corporation and this plaintiff, as the sole remaining stockholder thereof, and the said acts upon the part of said defendants were done for the purpose of robbing the said corporation and of misappropriating and stealing its funds and for the sole and only purpose of enabling the said Albert Steinfeld to rob and steal from this plaintiff the share of the properties of the said corporation which would, otherwise, be coming to him, as the owner of the said two hundred and fifty shares of stock standing in his name, as herein-

above alleged and set out; that the only properties the said Silver Bell Copper Company ever owned or was ever possessed of, outside of its office books, papers and records, were the properties
 622 conveyed by it to the said Imperial Copper Company, as hereinbefore alleged and set out, and that, after the making of said conveyance, the only properties the said Silver Bell Copper Company ever owned were the proceeds of said sale in cash and in notes, as aforesaid, and the said Silver Bell Copper Company now has no other property except that which is shown by the complaint as now left in the treasury of said corporation; that as hereinbefore alleged and set out, the defendants, Shelton, Curtis and Steinfeld, are the directors of the said corporation; that said Curtis and Shelton are under the absolute control of said Steinfeld; that if the moneys belonging to the corporation which have heretofore been illegally diverted, misappropriated and stolen from the said corporation as hereinbefore alleged, by and through the knowing acts of said directors, under the direction and control of the said Steinfeld, as hereinbefore alleged and set out, are again put under the control of said defendant directors all of said money will still be under the control
 623 of said Steinfeld, and the said Steinfeld, so having the control of said money and of the properties of the said corporation, will again misuse his power and will again misappropriate and wrongfully divert the funds and properties of the said corporation and will again convert the same to his own use in a manner that the same may not be followed by this plaintiff, or by any other stockholder of the said corporation or other party who may be interested in the same; that it is inequitable that said money should be paid by the said defendants again into the custody and control of the said directors to be again misappropriated and wrongfully diverted by them; that, to that, end, it is, therefore, meet, equitable and proper that a receiver of the properties, books and papers of said corporation should be appointed by this court in order to receive the said money and to properly apply the same to the business and debts of said corporation and that the same may be properly paid out, used and handled as this court, in the exercise of its discretion, may herein order, decree and determine.

That no part of any of said money so paid to the said Albert
 624 Steinfeld or retained by him, as hereinbefore alleged, and no part of the proceeds of said note so delivered to him, and no part of the dividends so paid to said Shelton, Curtis and Steinfeld has ever been paid back to said corporation or for its benefit, but the whole thereof still remains unpaid.

For a further and separate cause of action against said defendants, the plaintiff above named alleges:

I.

Plaintiff hereby refers to Paragraph I in the above and foregoing cause of action set out, to Paragraph II, to Paragraph III, to Paragraph IV, to Paragraph V, to Paragraph VI, to Paragraph VII, to Paragraph VIII, and to Paragraph IX, thereof, by this reference

making each and all of the allegations contained in said paragraphs a part of this cause of action and hereby as a part of this cause of action re-alleges each and all of said allegations to be true;

II.

That on or about the 29th day of June, 1900, Albert Steinfeld, defendant above named, advanced to and for the benefit of said Silver Bell Copper Company, the sum of two thousand (\$2,000.00) dollars, for the purchase by the said Albert Steinfeld, as the trustee and managing agent of said Silver Bell Copper Company, and for the use and benefit of said Silver Bell Copper Company the said three hundred shares of stock issued to and belonging to said Carl Neilsen, and for the purchase from said Carl Neilsen and one Lewis of those two certain mines mentioned in this complaint and known as the Accident and the Black Rock, and at the same time for said corporation entered into a contract with said Carl Neilsen and his wife, Mary Neilsen, by which he agreed to pay to said Carl Neilsen and Mary Neilsen the further sum of ten thousand (\$10,000.00) dollars, out of the proceeds of the workings of said Old Boot Mine, or in the event same should be sold before said proceeds of the sale thereof, which said contract was entered into by said Silver Bell Copper Company, by its president and by said Albert Steinfeld; that the certificate for said stock was issued to said Albert Steinfeld as trustee and in his name as trustee, the same being held by him as trustee as security for the repayment to him of said sum of two thousand dollars so advanced to said corporation, and for and upon which he thereafter charged said corporation interest, and the security to him that there would be paid to said Mary Neilsen and Carl Neilsen the said sum of ten thousand dollars out of the proceeds of the working of said Old Boot Mine, or out of the proceeds of the sale thereof, in the event said mine should be sold before the proceeds of the working of said mine should pay said sum of \$10,000.00;

That thereupon and thereafter said Albert Steinfeld by writing executed to said Silver Bell Copper Company, signed by him, acknowledged and declared that he held said stock in his name as trustee, as aforesaid, and for the purposes aforesaid;

That thereafter, and on or about the 21st day of May, 1903, and out of the said proceeds of the sale of said mines, said Albert Steinfeld paid to himself the said \$2,000.00 so advanced to and for the use and benefit of said corporation, with interest thereon at the rate of twelve per cent per annum from the date of the advancement thereof on the 29th day of June, 1900, to and including the 20th day of May, 1903, and which said sum so paid to himself was a part of said sum of \$18,117.00 paid to him as heretofore alleged, and thereafter and long prior to the 16th day of January, 1904, there was paid to said Mary Neilsen (the successor of herself and said Carl Neilsen) the said sum of \$10,000.00 out of the proceeds of the sale of said mine, together with all interests that might be due or owing thereon, and that thereupon every and all

obligations for which said stock was held by said Albert Steinfeld in trust were satisfied and fully performed, and said trust became and was thereupon fully executed and said three hundred shares of stock thereupon and long prior to said 16th day of January, 1904, became the absolute property of said Silver Bell Copper Company, without any right, title or interest therein whatsoever to said Albert Steinfeld;

That all the facts hereinabove alleged were at all times known to said defendants, J. N. Curtis and R. K. Shelton;

628 That thereafter and on the 20th day of January, 1904, and under the circumstances and conditions heretofore alleged and set out and in furtherance of the arrangement and conspiracy hereinabove alleged and set out, the said Albert Steinfeld caused the directors of said Silver Bell Copper Company to vote to him a dividend on said three hundred shares of stock of \$111.00 per share, and caused the officers of said company to pay said dividend to him, and on or about the 20th day of January, 1904, under and by virtue of said arrangement and on said dividend there was paid to said Albert Steinfeld the sum of \$33,000.00 as and for such dividend; that said defendants, Shelton and Curtis, and said Albert Steinfeld, as officers of said corporation, well knew that in paying to said Albert Steinfeld the said dividend they were violating their trust and obligation as directors and officers of said corporation, and that said Albert Steinfeld had no right to the same, and that said \$33,000.00 was the money and property of said Silver Bell Copper Company and should not have been paid to any person whatsoever; that thereupon and before the commencement

629 of this action, said Albert Steinfeld converted said \$33,000.00 to his own use and benefit, and except as heretofore specifically alleged and set out, did not convert said sum of money to the use or benefit of any other person or corporation whatsoever, and said Albert Steinfeld has not, nor has any other person whatsoever paid said \$33,000.00, or any part thereof, to said Silver Bell Copper Company, or to or for its use or benefit, but the whole thereof remains unpaid.

Wherefore the plaintiff above named prays:

1. That it be adjudged and decreed that the acts of the said board of directors of the defendant, the Silver Bell Copper Company, hereinabove alleged and set out, purporting to authorize and direct the payment to the said Albert Steinfeld and Mammoth Copper Company of the said sum of \$145,743.75 and of the turning over to them of the said promissory note, and of the allowing to them to retain the said sum of \$25,750.00 were all void, illegal, contrary to law and in violation of the rights of said corporation and of this
630 plaintiff as a stockholder thereof; and that the further acts of the said board of directors in purporting to declare and attempting to declare the said dividend of \$111.00 per share as a part of the same transaction, under the same agreement by which the said money and note aforesaid were paid to and turned over to the said Albert Steinfeld, were illegal and void and in violation of the rights of said corporation, and of this plaintiff, as a stockholder

thereof, and that said dividend was illegally declared and that all money paid thereunder was illegally paid and that the same, at all times, belonged to and is now the property of said defendant, the Silver Bell Copper Company.

2. Judgment against the defendant, Albert Steinfeld, that he do pay to the defendant, the Silver Bell Copper Company, the sum of \$145,743.75; the sum of \$103,937.00; the sum of \$33,000.00; the sum of \$27,639.00; the sum of \$25,750.00; the sum of \$111.00, making a total of \$338,710.75, with interest thereon from the 10th day of January, 1904, at the rate of 6 per cent per annum.

3. That Defendant, Mammoth Copper Company, pay to 631 said Silver Bell Copper Company all money it may have received under or by reason of any of the wrongful acts above alleged and set out.

4. That defendants, Steinfeld, Shelton, Curtis and Mammoth Copper Company do severally and collectively account and pay to said Silver Bell Copper Company any and all money they severally or collectively may have received for or for the benefit of said Silver Bell Copper Company, or which they may have received wrongfully or illegally from said Silver Bell Copper Company; to that end a full and complete account be had by and from each and all of said defendants (other than said Silver Bell Copper Company) in favor of and to said Silver Bell Copper Company;

5. Judgment in favor of this plaintiff and against the said Silver Bell Copper Company, that the said Silver Bell Copper Company pay to and reimburse this plaintiff for all of the expenses of this action, including such costs and attorneys' fees as he shall have paid and expended up to the close of the trial of this action and that said 632 Silver Bell Copper Company pay to the said above named attorneys such further and additional sum as attorneys' fees as this court shall deem equitable, right and just in the premises, and that each and all of the other defendants pay to the said Silver Bell Copper Company the costs of this action;

6. That a receiver be now appointed by this court to take charge of and receive all of the moneys, books, papers and other assets of said corporation to hold the same for the benefit of said corporation for its creditors and its stockholders and the same may be hereafter disbursed, paid out and distributed as to this court may seem right, meet and proper and in accordance with equity and good conscience and the rights of the parties interested therein.

7. For such other and further relief in the premises as to the court may seem right and proper.

FRANK H. HEREFORD AND
EDWIN A. MESERVE,

Attorneys for Plaintiff.

633

SCHEDULE EXHIBIT "A."

List of Properties Sold by the Silver Bell Copper Company to Imperial Copper Company on May 20, 1903.

Mammoth, Copper, Herbert, Confidence, Accident, Black Daisy, Black Eagle, Imperial, Pima, John F., Murray, Apache, Belle, Emerald, Papago, Pope, Prospector, Omaha, Leslie Hamilton, Baltimore, Maggie, Silver Bell, Swansea, Spike, Florence, Detroit, Billy, Southern Beauty, Sampson, Frank B., Union, Hilda, Wedge, Comet, Millionaire, Alliance, Page, Trudie, Northern, Yankee, Olympia, Strip, Mollie, El Paso, Fraction, Anita, Queen and Enterprise, also all other mining claims, mill sites and locations, which said parties have, or possess, in said Silver Bell Mining District, and not above enumerated; also all the property and plant, machinery, appliances, supplies, store goods, live stock and everything at present belonging to said mining claims and which is the property of either of said Silver Bell Copper Company or said Mammoth Copper Company.

634 *List of Mines Known and Referred to in this Amended Complaint as English Group of Mines.*

Herbert, Confidence, Black Daisy, Black Eagle, Imperial, Pima, John F., Murray, Apache, Belle, Emerald, Papago, Pope, Prospector, Omaha, Leslie, Hamilton, Baltimore, Maggie, Silver Bell, Swansea, Spike, Florence, Detroit, Billy, Southern Beauty, Sampson, Frank B., Union, Hilda, Wedge, Comet, Millionaire, Alliance, Page, Trudie, Northern, Yankee, Olympia, Strip, Mollie, El Paso, Fraction, Anita, Queen, Enterprise.

TERRITORY OF ARIZONA,
County of Pima, ss:

Louis Zeckendorf being first duly sworn upon his oath, says that he is the plaintiff in the above entitled action. That he has read the foregoing Amended Complaint and knows the contents thereof. That the allegations and statements therein contained are true in substance and in fact; when stated on information & belief, and when thus stated he verily believes the same to be true.

LOUIS ZECKENDORF.

Subscribed and sworn to before me this 4th day of January, 1908.
My commission expires Jan. 30, 1911.

[SEAL.]

JAMES DUNSEATH,
Notary Public.

(Filed January 4, 1908.)

635 In the District Court of the First Judicial District of the Territory of Arizona, in and for the County of Pima.

LOUIS ZECKENDORF, Plaintiff,

VS.

ALBERT STEINFELD, R. K. SHELTON, J. N. CURTIS, SILVER BELL
COPPER COMPANY, a Corporation, and MAMMOTH COPPER
COMPANY, a Corporation, Defendants.

Answer to Third Amended Complaint.

Now come the defendants other than the Mammoth Copper Company, and demur to the plaintiff's third amended complaint, on the following grounds:

I.

That there is a defect of parties defendant in that the defendant the Mammoth Copper Company is not a proper party to
636 the second cause of action in said third amended complaint set forth.

II.

That there is a misjoinder of causes of action in that the proper parties defendant to one cause of action in said third amended complaint set forth are not proper parties defendant to the other cause of action in said third amended complaint set forth.

III.

That the facts alleged in the first cause of action in said third amended complaint set forth are not sufficient to constitute a cause of action.

IV.

That the facts alleged in the second cause of action in said third amended complaint set forth are not sufficient to constitute a cause of action.

V.

That the first cause of action in said third amended complaint set forth is barred by limitation.

VI.

637 That the second cause of action in said third amended complaint set forth is barred by limitation.

FRANCIS J. HENEY,
EUGENE S. IVES,
Attorneys for Defendants.

And now comes the defendant, the Mammoth Copper Company and separately demurs to the plaintiff's third amended complaint on the following grounds:

I.

That there is a defect of parties defendant in that defendant, the Mammoth Copper Company, is not a proper party to the second cause of action in said third amended complaint set forth.

II.

That there is a misjoinder of causes of action in that the proper parties defendant to one cause of action in said third amended complaint set forth, are not proper parties defendant to the other cause of action in said third amended complaint set forth.

638

III.

That the facts alleged in the first cause of action in said third amended complaint set forth are not sufficient to constitute a cause of action.

IV.

That the facts alleged in the second cause of action in said third amended complaint set forth are not sufficient to constitute a cause of action.

V.

That the first cause of action in said third amended complaint set forth is barred by limitation.

VI.

That the second cause of action in said third amended complaint set forth is barred by limitation.

FRANCIS J. HENEY,
EUGENE S. IVES,
*Attorneys for Defendant,
Mammoth Copper Co.*

639 If the foregoing demurrers be overruled, the defendants further answering the first cause of action in the third amended complaint set forth, allege and aver:

I.

Defendants deny that prior to the 20th day of May, 1903, three hundred shares or any of the stock of the Silver Bell Copper Company were purchased by the said company, the same being taken in the name of Albert Steinfeld, trustee or otherwise, or at all, or that at all or any times after said alleged purchase the said Albert Steinfeld held said stock or any thereof, in his possession as trustee, as the property of or for the benefit of said corporation, or that long prior

to the said 20th day of May, 1903, or at any time, the actual outstanding stock of said corporation had been seven hundred shares or any less than one thousand shares, or that one share of the stock standing upon the books of the company in the name of R. K. Shelton is in fact the property of Albert Steinfeld, or that said Shelton, as a matter of fact, has no interest of property therein, and alleges that on the 9th day of December, 1903, the said Shelton became the owner of one share of said stock and ever since 640 has been, and now is, the owner thereof.

And defendants allege that long prior to the 20th day of May, 1903, and at all times between the date of the purchase of the said 300 shares of stock until the said 20th day of May, 1903, the said Steinfeld owned 549 shares of the capital stock of the said defendant corporation, and that the said Steinfeld owned the said 549 shares of stock prior to and at the time of the declaration of the dividend in the said amended complaint set forth, and from said time to the commencement of the said action, and that the said Steinfeld now owns the same.

Defendants deny that the Mammoth Copper Company is an instrument in the hands of Albert Steinfeld, used by him for the purpose of covering up any alleged or intended frauds or illegal transactions; and deny that all or any of the acts or things done by the said Steinfeld or in the name of the said Mammoth Copper Company, or all or any of the things received, given or paid by, to or in the name of the said Mammoth Copper Company, were in fact acts or things done or received, given or paid by or to the 641 said Albert Steinfeld.

The defendants deny that any money which may on its face have been paid to the defendant Albert Steinfeld or any property which may on its face have been delivered to the said Albert Steinfeld as in any part of the third amended complaint alleged or set out, for the benefit of the said Albert Steinfeld and the said Mammoth Copper Company jointly, were in fact or in truth paid or delivered to the said Albert Steinfeld or were appropriated by him to his own individual use; and allege that all moneys received by the said Steinfeld as belonging to himself and the said Mammoth Copper Company were received by him on behalf of the said Mammoth Copper Company by its authority and as its agent, and that the said Steinfeld had no interest in any of said moneys so paid to him on behalf of said Mammoth Copper Company except insofar as he was a stockholder of the said Mammoth Copper Company.

II.

The defendant Shelton denies, and the other defendants 642 deny upon information and belief, that the defendant Shelton at all or any of the times mentioned in the amended complaint has been the representative of said Albert Steinfeld on said board of directors of the said Silver Bell Copper Company, or that during all or any of said times he has voted as ordered or directed or requested by said Albert Steinfeld and not otherwise; and allege that said

Shelton has at all times voted as a director independently and as he believed for the best interests of said corporation.

The defendant Curtis denies, and all of the other defendants upon information and belief deny, that the defendant Curtis during all or any of the times in the complaint mentioned was under the control or direction of the said Albert Steinfeld or as director of said corporation, at all or any times, did what the said Albert Steinfeld directed, and at no time, under no circumstances did any act, take any vote or cast any ballot except as requested or directed by said Albert Steinfeld, and alleges that said Curtis has at all times voted as director

independently and as he believed for the best interests of
643 said corporation. And the defendants deny that the said

Albert Steinfeld was at all or any of the times in the amended complaint mentioned, in fact, by reason of his alleged control of the other two members of the said board or either of them, in absolute or any control or direction of the board of directors of the above corporation and the defendants deny that all or any acts, things or votes taken by said board since the 20th day of May, 1903, and up to and including the date of the filing of the complaint were taken by or under the direction of the said Steinfeld or at his request and not otherwise; and deny that all or any of the votes, motions, resolutions or other acts of said board adopted, passed or done by it, were done by or under the direction of or control of the said Albert Steinfeld and not otherwise, and allege that all acts, things and votes taken by said board, and all motions, resolutions and acts of said board were the independent acts thereof, with a view to the best interests of the corporation.

The defendants deny that because of any facts it will be, or
644 would have been idle or useless act for the plaintiff to make demand on the said board of directors to bring action for the recovery of property belonging to the said corporation or for the payment to said corporation of any debt owing by any or either of the parties hereto to said corporation, or that any such action, if brought in the name of said corporation would not be prosecuted in good faith or with full intent that full recovery should be had thereon for the benefit of said corporation or of the plaintiff as a stockholder thereof.

III.

The defendant Steinfeld denies and the other defendants upon information and belief deny that the defendant Steinfeld at all or any of the times in paragraph III of the third amended complaint set forth, or at any time prior to the dissolution of the firm of L. Zeckendorf & Co. employed or discharged all of its help, or gave or extended all credits or determined its business policy in all matters or things in the Territory of Arizona, or in connection with its business therein; and the defendant Steinfeld alleges, and the other defendants
645 upon information and belief allege that said Zeckendorf during all of said times, assumed the right, and at various times exercised the right to employ and discharge help of the said firm; and that said Zeckendorf assumed the right and exercised

the same to limit credits given or extended by the said firm and to determine its business policy in matters and things in the said territory and in connection with the said business therein.

The defendant Steinfeld denies, and the other defendants upon information and belief deny that the said Steinfeld caused to be conveyed to the said Neilsen Mining and Smelting Company the Old Boot Mine for an agreed price of \$25,000.00 or for any price whatever; and alleges that he caused an option to be given to the said Neilsen Mining and Smelting Company to purchase the said mine for the agreed price of \$25,000.00 to be paid to the said William and Julia Zeckendorf in installments of \$2,500 quarterly.

The defendants deny that Carl Neilsen was elected the nominal general manager and superintendent of the said company, and

alleges that the said Neilsen was elected general manager
646 and superintendent of the said company actually and in fact;

and deny that at all or any times after the organization of the said company or at any time whatever, the said Steinfeld assumed to be the general manager of the said company or assumed the power of conducting its affairs or any of them, or of controlling all or any of its actions, or assumed the power of directing its affairs or any of them, or of controlling all or any of its actions, or that said alleged assumption of power on the part of the said Steinfeld was assented to or acknowledged by the said Curtis, Neilsen and Shelton or any or either of them, and deny that said Steinfeld was at all or any times thereafter the actual manager or managing agent of said company or of its affairs, or any of them; and the defendants allege that at all times from the organization of the said company down to the 20th day of May, 1903, the said company was heavily indebted to the said firm of L. Zeckendorf & Co., and that the said company at no time was able to pay the said indebtedness; that its stock had all been issued and was non-assessable and that by virtue

of its articles of incorporation the indebtedness of said com-
647 pany was limited to the sum of \$25,000, and that the said company on the first day of January, 1900, and at all times between the said first day of January, 1900, and the 20th day of May, 1903, was indebted to the said firm of Zeckendorf & Co., in a sum greatly in excess of the sum of \$25,000, and that the said company was at all times unable to pay the said sum of money or to reduce the said indebtedness below the sum of \$25,000, and that any influence on the part of the said Steinfeld, either personally or as manager of the firm of L. Zeckendorf & Co. upon the affairs or operations of the said company arose from the fact that the firm of Zeckendorf & Co. was a creditor of the said company as aforesaid and that the withholding of further credits and advances by said firm to the said company would necessitate the cessation of active operations by the said company.

The defendants deny that large or any ore bodies in the Old Boot mine were developed or were extended to within a short distance of the boundary line thereof, being the dividing line between the said

mines and the Prospector mine, one of the mines known as
648 the English group of mines in the third amended complaint referred to; and all of the defendants except the defendant

Shelton allege, and the said Shelton upon information and belief alleges that at none of the times in the third amended complaint mentioned, were the workings in the Old Boot mine nearer than 200 feet to the said boundary line of the said Prospector mine; and the defendants deny that from said alleged development work, or at all, it became evident that said alleged ore bodies then or at any time developed underneath the ground in said Mammoth mine ran into said Prospector mine or either of said English group of mines, or that said alleged facts or either of them were ascertainable alone from an examination or inspection of the underground workings of said Mammoth or Old Boot mine; and the defendants deny that the defendant Curtis on the order or direction of the said Steinfeld took up in his own name other mines around or surrounding said Old Boot mine as in the third amended complaint set forth; and allege that the said Curtis took up mines as in said amended complaint on page 9 alleged of his own volition and account and
 649 for the best interests of the said company and without the order or direction of any person whatever.

The defendants deny that the said Mammoth or Old Boot mine during the fall of the year 1899, and up to the time of the closing of said mine in the spring of 1900, was being worked at a profit; and deny that at the time of the closing of said mine it was yielding a profit of about \$500 per day or \$15,000 per month.

The defendants deny that in the fall of 1899, the said Curtis advised or informed, or at any time, advised or informed said Steinfeld that the development of said Mammoth mine showed that the underground ore bodies therein would run into said Prospector mine, or other mines belonging to said English group of mines, or that said underground workings showed that there was probably great value in said English group of mines; and that at the said Steinfeld in the month of January, 1900, or at any time, assumed to discharge
 650 the said Neilsen as general manager and superintendent of said mines; and allege that in the discharge of the said Neilsen the said Steinfeld was repeating and carrying out the wishes and orders as informally but clearly expressed to him by the directors of the said company; and the defendants deny that the said Steinfeld ordered the said Mammoth mine to be closed down and all work thereon to be stopped in order that the English group of mines so-called and the Francis and Volkert titles thereto, or either of them, might be purchased at a nominal or small sum without the owners thereof obtaining knowledge through the workings of said Mammoth mine or the showing of ore therein that said ore bodies probably did or would extend into the said English group of mines or any of them; and the defendants allege that at all times and prior to the organization of the defendant corporation, the Silver Bell Copper Company, the said Steinfeld had appreciated and known that it was important that the English group of mines should be acquired and owned by some one who would sell the same in one group with the group of mines owned by the said Silver Bell Copper Company and
 651 that the said English group of mines and mines owned by the said Silver Bell Copper Company would, if sold in one group, sell for a larger sum than the total of the sums for which each

group of said groups of mines could be sold for separately, and knew that the Old Boot mine and the other mines owned by the said Silver Bell Copper Company sold alone would not have a market value of enough money and could not be sold for enough money to reimburse the said firm of L. Zeckendorf & Co. for the amounts owed by the said company to the said firm, and at the same time pay a reasonable compensation to the said Curtis and to the firm of Zeckendorf & Co. for the time and attention which the indebtedness of the said company to the said firm had required and made necessary.

And the defendants deny that the said Curtis as the president of the said defendant corporation, frequently advised or notified said Steinfeld that it was very desirable that said English group of mines should be purchased, but admit and allege that the said Curtis and the

652 said Steinfeld frequently discussed each with the other, the fact which was at all times known to both of them, that it was

very desirable that said English group of mines should be purchased as aforesaid; and the defendants deny that the said Steinfeld before the alleged order that said mine be closed or work thereon be stopped, ascertained or learned the truth of the alleged statements or any of them alleged to have been made to him by said Curtis as to either the ore bodies in the said mine or their tendencies or to the necessity of acquiring title to said English group of mines, and deny that said Steinfeld acquired such or any information only or solely because of the fact that he was acknowledged or conceded to be the actual manager of said Neilsen Mining and Smelting Company, or because of his assumption of such power or of such possession, or that he acquired said alleged knowledge or information solely from said Curtis, or from his examination of said mine made by him as such alleged, assumed or acknowledged actual manager of said company; and deny that the personal control of said mine was at the time of the discharge of said Neilsen or at any time, placed

653 in said Curtis by direction of the said Steinfeld; and allege that the said Curtis at all times from the organization

of the said company was its president by virtue of that position and of his general employment and agreement with the said firm of Zeckendorf & Co., had general control and superintendence of the said mine and deny that said mines were closed down by said Steinfeld solely or exclusively for the purpose of enabling him as the agent or representative of the Neilsen Mining and Smelting Company or at all to acquire such English group of mines or any of them or the Volkert and Francis titles thereto or any or either of them or getting rid of said Neilsen; and allege that at the time of the closing down of said mines the said company was indebted to the said firm of L. Zeckendorf & Co. in a sum in excess of \$75,000, and that there was no ore in sight capable of supplying the smelter which was being operated by said company and that the said smelter was shut down by reason of the fact that there was no ore in sight wherewith to operate the same; and allege that no development work could be done or prosecuted upon the said mine except with an outlay of money and

654 that the said mine had no funds with which to pay for any development work and no way under its charter and the laws

of the Territory of Arizona or of the United States of acquiring any money for purposes of operation or development work or for the acquisition of any other properties or for any purpose whatever.

The defendants deny that on or about the 29th day of June, 1900, the said Steinfeld as agent or representative of or for the benefit of the said Neilson Mining and Smelting Company purchased from the said Neilson 300 shares of the stock belonging to the said Neilson; and allege that said Steinfeld purchased the said stock with his own money and for his own use and benefit and not otherwise; and that in making said purchase and thus getting rid of said Neilson the said Steinfeld aimed to benefit, and, as a matter of fact, did benefit the said corporation by getting rid of an inharmonious factor in its management and ownership of stock, to-wit, the said Neilson, although the said corporation did not receive the direct benefit of the acquisition by itself of the said shares of stock; and the defendants

allege that under and by virtue of the charter of the said
655 corporation and the laws of the Territory of Arizona, the said corporation was wholly without right to purchase its own stock either in its own name or through any person or in the name of any other person as trustee; and that the purchase of its own stock by said corporation would have been an ultra vires act; and the defendants further allege that at the time of the purchase of the said stock as aforesaid, the said corporation was indebted to the firm of L. Zeckendorf & Co. in an amount in excess of the sum of \$75,000 and that the said company was prohibited by its charter from incurring indebtedness in excess of the sum of \$25,000, and that it had no money or funds on hand and that the said company had no right or authority under its charter and the laws of Arizona to incur any further indebtedness for the purchase of the said stock or mines or for any purpose whatever; and deny the interpretation of the said agreement of June 29, 1900, as in paragraph III of the third amended complaint alleged and set forth on pages 12 and 13 thereof, and

deny that the agreement therein alleged and set forth was ever
656 made or entered into and, upon the trial of this action defendants will produce the true and only agreement on that subject which was ever made or entered into, and refer to the same; and defendants deny that said sum of \$10,000 due under said contract was paid by said Steinfeld to Mary Neilson, the successor of Carl Neilson out of the proceeds of the sale of the said mine derived from such Imperial Copper Company, and allege that the said \$10,000 was paid to the said Mary Neilson by the said Steinfeld out of his own funds and on or about January 24th, 1904.

And defendants deny upon the closing down of the said mine and in the spring of 1900, said Steinfeld as agent or representative of or for the benefit of the said Neilson Mining and Smelting Company purchased from said Francis and Volkert their interest in said group of mines, and allege that on or about the 15th day of May, 1900, the said Steinfeld purchased from the said Francis and Volkert their interest in the said mines for the sum of \$15,000, \$2,500 in cash and \$12,500 to be paid out of the proceeds of the sales of the said mine,

in the event that the same were sold, and that he paid to the
657 said Francis and Volkert the said sum of \$2,500 out of his
own funds at or about the said 15th day of May, 1900, and
that he made the said purchase for his own use and benefit and not
otherwise; and allege that the acquisition of said mines by the said
Steinfeld was a benefit to the said defendant corporation by reason of
the fact that the said Steinfeld was ready at all times after his ac-
quisition of the said mines to sell the same in conjunction with the
said Silver Bell Copper Company as one group of mines, and that
as hereinbefore alleged the sale of the said two groups of mines as one
group would enable the owners of each group to obtain a larger
price for the group belonging to each of them than if the said groups
were sold separately and without relation each to the other; and the
defendants allege that at the time of the acquisition of the said Francis
and Volkert titles by the said Steinfeld and at the time of the
acquisition of the English titles to the said English group of mines
by the said Steinfeld, to-wit, in the fall of 1900, the said defendant,
the Silver Bell Copper Company, was indebted to the firm of
658 Zeckendorf & Co. in a sum in excess of the sum of \$75,000
and that the said company by its charter and the laws of
Arizona was not authorized to incur any indebtedness in a sum greater
than the sum of \$25,000, and had no money or funds on hand, and
was, therefore, unable and unauthorized to purchase the said mines
or any of them or any property whatever.

And the defendants deny that the said sum of \$12,500 or any part
thereof was paid by said Steinfeld to said Francis or Volkert out of
the proceeds or any thereof, received from said Imperial Copper Com-
pany and allege that the said sum of \$12,500 was paid by the said
Steinfeld out of his own personal funds on or about January 10th,
1904; and the defendants deny that the sum of \$5,000 paid by the
said Steinfeld for the English group of mines to the holders of the
English titles thereto and the said sum of \$2,500 paid to said Francis
and Volkert were amounts much or any less than the said mines
could have been purchased for if the owners of said English group
of mines had been possessed of all of the knowledge that the said
Steinfeld had acquired of the tendency of the ore bodies in
659 said Mammoth and Old Boot mines; and deny that said Stein-
feld was enabled to purchase said mines at such alleged re-
duced price wholly or solely because of the fact that the said mines
were shut down or that said workings thereon were stopped; and deny
that the said mines were shut down and the workings thereon stopped
to the great or any loss or damage of the said Neilson Mining and
Smelting Company, and allege that long prior to the shut down of
said mines in the spring of 1900, the said Steinfeld had entered into
an agreement with the owners of the titles to the English group of
mines to purchase from them such English group of mines for the
sum of \$5,000, and that the final purchase of the said mines by the
said Steinfeld was only a consummation of the said agreement there-
fore made to purchase the same. The defendants deny that when
the mines were again put in operation and worked, profits could not
be derived from the said workings by reason of the alleged deprecia-

tion of the price of copper; and deny that the said mines sustained a great or any damage by reason of the shut down of the said mines or the depreciation in the price of copper or a damage far or at all in excess of the price paid by said Steinfeld for said mines.

Defendants deny that immediately or at any time upon acquiring said two mines from the said Neilson and Lewis and said English group of mines, the said Steinfeld turned the same over to the possession of the said Neilson Mining and Smelting Company prior to the month of December or at any time, or that said Neilson Mining and Smelting Company thereupon or at any time assumed the possession thereof or the control thereof or at all times thereafter by the consent or with the knowledge of the said Steinfeld treated the said mines or any thereof as its own, and deny that in the month of December, 1900, said Neilson Mining and Smelting Company performed the annual assessment work on the said mines required by the laws of the United States to be performed on all mines for the year 1900, or thereafter performed said assessment work on said mines for the year 1901 and the year 1902, except as hereinafter alleged and set forth.

Defendants deny that the said Curtis prepared maps or reports of the said properties under the direction of the said Steinfeld except as hereinafter admitted and alleged; and defendants deny that the said Curtis as the president of the said Silver Bell Copper Company or at the direction of the said Steinfeld credited said Steinfeld with all or any of the money which he had paid to the said Volkert or to the said Nielson for the English titles or credited him with one per cent interest on such sums, or that said or any credit in favor of the said Steinfeld on the books of the said company were made by or at the direction of the said Steinfeld or included in said alleged credit the expense of his son and himself to various places on the continent of Europe taken at the same time and in no way connected with the said trip to England for the purpose of purchasing the said mines, or caused himself to be credited with all or any moneys paid by him for or on account of or in any way connected with the purchase of the said mines; and allege that prior to the 19th of May, 1901, one Selim M. Franklin, as the personal and confidential attorneys of the said Steinfeld and who had been for many years and was then the attorney for the firm of L. Zeckendorf & Co., and as attorney for the firm of L. Zeckendorf & Co. had organized the said Nielson Mining and Smelting Company and was at all times from and after the organization of the said Nielson Mining and Smelting Company its attorney. That the said Franklin at all of said times was duly admitted to practice law in the Territory of Arizona; that prior to the 19th day of May, 1901, the said Steinfeld claimed to be the owner, for his own use and benefit of the said English group of mines and the said 300 shares of stock purchased from the said Nielson as aforesaid; that the said Curtis and the said Franklin claimed to the said Steinfeld that he held the said stock and the said mines as trustee for the said Silver Bell Copper Company, and that the said

Franklin advised said Steinfeld, as a matter of law, that the conditions under which the said Steinfeld had purchased the said stock and the said English group of mines from the said Francis and Volkert and the English owners thereof were such that the law would

not permit the said Steinfeld to retain the beneficial ownership of the said mines or of the said stock; that the said

Steinfeld had confidence in the legal opinion, wisdom and judgment of the said Franklin, and in his integrity, and was influenced by the said representations of the said Franklin, and did thereupon believe that while he had purchased the said stock and the said mines with his own money and for his own use and benefit that the said Franklin had correctly stated the law to him and that he therefore held the said stock and the said mines as trustee for the said company, and that such opinion and belief of the said Steinfeld was due wholly and exclusively to such opinion of the said Franklin and such statement by the said Franklin to the said Steinfeld made to the said Steinfeld as his attorney and as the attorney for the said company; and that thereupon, and on or about the 19th day of May, 1901, the said Steinfeld by reason of such representations and statement and opinions of the said Franklin, and wholly influenced thereby, did write to the said Curtis, suggesting that the said Curtis credit him on the books of the Neilson Mining and Smelting Company, as trustee, for the disbursement incurred in the purchase

of the said group of mines and the said 300 shares of stock and asking for the interest on the same to date; and that thereupon, and acting upon the said letter so written by the said Steinfeld, and wholly influenced by the advice and opinion of the said Franklin, the said Curtis, did make such entries in said books, which are the entries referred to in the third paragraph of the third amended complaint at pages 16 and 17 thereof; and that the said Curtis did thereupon send to the said Steinfeld checks of the said Silber Bell Copper Company for the interest upon the amounts so disbursed by the said Steinfeld. That thereafter the said Steinfeld did consult the said Franklin as attorney as aforesaid with respect to the said entries and the said checks for interest, and the said Franklin did advise the said Steinfeld that the said company had no authority to obligate itself to repay to the said Steinfeld the said sums so disbursed by him or to pay to the said Neilson and to the said Francis and Volkert the \$10,000 and \$12,500, respectively, due to them, and that the said Steinfeld was not

entitled to the said interest, and that the said company was under no obligation to pay to the said Steinfeld the amount so disbursed; and that thereupon the said Steinfeld, relinquished the claim which he had made, acting as he had thought under the advice and direction of the said Franklin as attorney as aforesaid, and returned to the said Curtis as President of the said Silver Bell Copper Company the said checks for interest which the said Curtis had sent to him, and that the said entries were made and the said interest was paid under a misapprehension and mistake of law by both the said Steinfeld and the said Silver Bell Copper Company,

acting through the said Curtis as its President, and the said mistake was corrected by both the said Steinfeld and the said Silver Bell Copper Company, and such correction was consummated and ratified by the receipt from the said Steinfeld and by the said Curtis as President of the said Silver Bell Copper Company of the interest upon said amounts which had been sent by the said Curtis to said Steinfeld under such mistake as aforesaid; and the defendants deny that such credit or charge on the books of the said company so made by said Curtis in the month of May, 1901, was made on the written order or direction of the said Steinfeld or that in any 666 . writing the said Steinfeld stated that said moneys so paid by him were paid as an advance to or for the use of the said Silber Beil Copper Company.

Defendants deny that after the said month of May, 1900, and in the month of July, 1901, the said Curtis and the said Franklin went to the said Albert Steinfeld and stated to him that they understood he would claim such English group of mines as his own; and allege that they went to the said Steinfeld and so stated to him prior to the 19th day of May, 1901; and allege that the various representations alleged in paragraph 111 of the third amended complaint on pages 17 and 18 to have been made by the said Franklin and Curtis to the said Steinfeld were made not in the month of July, 1901, but prior to the 19th day of May, 1901, and deny that the said Steinfeld or at any time agreed to the effect that he held such properties in trust for said Silver Bell Copper Company except as hereinbefore alleged; and deny that the said Steinfeld stated that all he desired was a repayment of the moneys which he had advanced or which he had theretofore caused the said Curtis

667 to credit on the books of the said Silver Bell Copper Company or then or there agreed that he would continue to hold said properties or any thereof in trust for said Silver Bell Copper Company until his action in purchasing the same was disaffirmed or affirmed by the stockholders of said Silver Bell Copper Company, at which all of the stock should be voted by persons competent to vote the same, or that he then and there agreed that he would continue to hold said properties in trust for the said company or at all; and deny that no stockholders' meeting was ever held or that the action of the said Steinfeld was never disaffirmed; and deny that the said company ever prior to the 20th day of May, 1903, ratified or affirmed the alleged purchase by said Steinfeld of the said properties and said stock as having been so purchased by him as its agent and for its use and benefit; and deny that the said company at any time prior to about the 20th day of May, 1903, obligated itself to pay or agreed to pay to the said Steinfeld the sums of money paid by him for the said stock or the said English group of mines or any thereof, or offered him any sum

668 whatsoever with respect to the same or any thereof, or offered to obligate itself to pay with respect to the same or any thereof; and deny that the said Steinfeld ever stated in a letter addressed to the plaintiff that he had always held said properties in trust for the said Silver Bell Copper Company, or that

he had advanced said money for the use and benefit of the said company or that he advanced or paid to the said Neilson \$2,000 for the said company, and defendants deny that the said Steinfeld at divers or different times during the year 1900 before the purchase of the said English group of mines or at any time before such purchase, by letters to the plaintiff and to the said Curtis or either of them stated in effect or at all, or in any way, that he was going to purchase the same for the Neilson Mining and Smelt- Company or for its use or benefit; and defendants deny that in the month of March, 1901, or at any time, the said Steinfeld called upon the said Curtis to prepare a written report of the mines or mining properties of the Silver Bell Copper Company, or that on the 24th of March, 1901, and pursuant to the said alleged request the said Curtis as the president of the said company, delivered to the

669 said Steinfeld a written report or statement, particularly describing the properties of the Silver Bell Copper Company in which written report the said Curtis included a description of the said English group of mines or that said Steinfeld in said month of March, or in the month of April, 1901, circulated said written report or at all, copies thereof to various or to different people, or to the plaintiff, as being a correct report of the mines or mining properties of said Silver Bell Copper Company in the sense and with the meaning and significance as in said paragraph III of the third amended complaint at page 19 thereof alleged; and allege that the said Steinfeld was at all times ready and willing that the said English group of mines should be sold as one group with the properties of the Silver Bell Copper Company, and that all requests, reports and statements with reference thereto as in said portion of the said amended complaint set forth mean, and were intended by the said Steinfeld to mean that the said properties were to be sold as one group with the properties of the said Silver Bell Copper

670 Company and nothing else; and the defendants deny that the said 300 shares of stock or any thereof was always held by the said Steinfeld as trustee for the use or benefit of the said Silver Bell Copper Company; and the defendants deny that the said Steinfeld has given options during the years 1901, 1902 and in the spring of 1903, or at all, on all of said mines described in said Schedule A, for one entire purchase price with no suggestion to any officer or member of said Silver Bell Copper Company that any part or portion of the said parties other than the said sum of \$18,117. was to come to him, the said Steinfeld, and allege that at all times the said Steinfeld insisted and expressed to the said Silver Bell Copper Company and to the said Curtis and to the said Franklin as representing it, that he would hold the said properties as his own, and for his own use and benefit unless a certain option given by him to the said Silver Bell Copper Company was availed of by said company before its termination on the 15th day of October, 1901, which said option was afterwards extended until the 15th day of September, 1902; and defendants deny that the said

671 Steinfeld without consultation with any officer of the said Silver Bell Copper Company fixed the price at \$515,000 on

said entire group of mines and all of said properties; and deny that said price was fixed without any suggestion on the part of said Steinfeld that any part or portion thereof was claimed or would be claimed by him, except the said sums so expended by him, for the purchase of said mines; and deny that on the 13th day of May, 1903, or at any time, said Albert Steinfeld reported to the board of directors of said Silver Bell Copper Company that he had given an option to one George A. Beaton on all of the company's property for the purchase price of \$515,000, or that said option thereupon or at any time or upon the request of said Steinfeld, or at all, was confirmed, and allege that the said report made by the said Steinfeld on the 13th day of May, 1903, was as follows, to-wit: Mr. Steinfeld stated that on April 3, 1903, he had made or given on behalf of himself and the Mammoth Copper Company and of this

company (referring to the defendant the Silver Bell Copper Company) a written option to George A. Beaton for the sale amongst other things of all the property rights, interests and assets of this corporation (meaning the Silver Bell Copper Company) and that the other things referred to therein were the said English group of mines owned by the Mammoth Copper Company and certain mines owned by the said Albert Steinfeld, and that the said proposition so made by the said Steinfeld was set forth correctly and as hereinabove and in the language hereinabove cited, upon the minute book of the said corporation. Defendants deny that the first installment of the purchase price paid by the Imperial Copper Company and the four promissory notes were paid and delivered or received by said Steinfeld as the treasurer of the Silver Bell Copper Company as its property and deny that he in any capacity received it except in pursuance of a certain agreement hereinafter referred to and attached to this answer; and the defendants deny that the directors of the Silver Bell Copper Company adopted or caused to be spread upon its minutes under date of May 20th,

1903, the resolution set forth on pages 23, 24, 25 and 26 of paragraph 111 of the third amended complaint after the consummation of the sale to the Imperial Copper Company or after the deed of the Silver Bell Copper Company to the said mines had been executed, or after all or any of the papers had been executed and delivered to the said Imperial Copper Company that were delivered to it in connection with the said deal or after the said Imperial Copper Company had paid to the said Steinfeld as the treasurer of said Silver Bell Copper Company or at all, the first installment or cash payment on said purchase price, or had delivered to him the four promissory notes making up the balance of said purchase price; and allege that the said sale was consummated and the said deeds delivered and the said cash paid and the said promissory notes delivered after the passage of said resolutions by the said directors and after the execution of the said agreement attached to this answer, and in pursuance of the said resolution and the said agreement.

IV.

The defendants admit that on and prior to the 20th day of
674 May, 1903, and at the time of the making of the sales in
the complaint mentioned, the said defendant corporation,
the Silver Bell Copper Company, was the owner of certain property
in the Silver Bell Mining District, County of Pima, Territory of
Arizona; and that some of the property set forth in Schedule "A"
annexed to the amended complaint, at said time belonged to the said
corporation, but deny that all of the property in said schedule ex-
hibit "A" set forth at said time, belonged to the said corporation;
and allege that those certain mining claims mentioned in said ex-
hibit "A," known as the Silver Bell or English group of claims were
at all times the property of the said Albert Steinfeld and the Mam-
moth Copper Company, and that the said claims so belonging to
the said Steinfeld and the Mammoth Copper Company are as
follows:

Herbert, Confidence, Accident, Black Daisy, Black Eagle, Im-
perial, Pima, John F., Murray, Apache, Bells, Emerald Papago,
Pope, Prospector, Omaha, Leslie, Hamilton, Baltimore, Maggie,
Silver Bell, Swansea, Spike, Florence, Detroit, Billy, Southern,
Beauty, Sampson, Frank B., Union, Hilda, Wedge, Comet,
675 Millionaire, Alliance, Page, Trudie, Northern, Yankee,
Olympia, Strip, Mollie, El Poso, Fraction, Anita, Queen,
Enterprise.

Defendant deny that prior to the 20th day of May, 1903, or at
any time the said Steinfeld in his own name and in the name of
the Mammoth Copper Company, or in the name of either himself
or of the said company, had purchased any properties listed or
scheduled in said exhibit "A" or any portion thereof, in trust for
or for the use of or benefit of the said defendant Silver Bell Copper
Company; and the defendants allege that the said Steinfeld prior
to said 20th day of May, 1903, did purchase certain of said prop-
erties, to-wit, those heretofore in this paragraph enumerated, with
his own money and for his own use and benefit.

The defendants allege that on or about the 15th day of July,
1901, the said Steinfeld on behalf of himself and the said Mam-
moth Copper Company did make a certain offer or proposition to
the said Silver Bell Copper Company whereby he offered to sell the
said properties to the said Silver Bell Copper Company for
676 a certain sum of money, and whereby it was provided that the
said offer should cease and determine on the 15th day of Oc-
tober, 1901, unless accepted by the said company on or prior to
said date; and the defendants allege that the said Silver Bell Cop-
per Company failed to accept or to avail itself of the said offer or
proposition or to pay or offer to pay the sum of money stipulated
therein or any part thereof or to offer or to obligate itself to pay said
sum or any part thereof, or to offer to buy the same on or before the
said 15th day of October, 1901; and the defendants further allege
that on or about the first day of October, 1901, the said Steinfeld
did offer to the said Silver Bell Copper Company that he would

extend the time within which the said Silver Bell Copper Company might avail itself of or accept the said offer or proposition until the 15th day of September, 1902, provided that in consideration of such extension of such time the said Silver Bell Copper Company would agree to do the annual assessment work required to be done on said property for the years 1901 and 1902, and that the said offer to extend the time for the consideration aforesaid for
677 acceptance of said offer made by the said Steinfeld was duly accepted by the said Silver Bell Copper Company by resolution passed by its board of directors on or about the said first day of October, 1901, and that in pursuance of the contract so made by said offer to extend the time and its acceptance the said Silver Bell Copper Company did do and perform the annual assessment work upon the said properties for the said years 1901 and 1902; and defendants allege that the said Silver Bell Copper Company failed and neglected to accept said offer and did not accept the same; and the defendants deny, except as hereinabove in this paragraph alleged, that the said Steinfeld in his own name or in the name of the said Mammoth Copper Company had offered the said Silver Bell Copper Company in writing or otherwise the said properties or any thereof would be conveyed to said Silver Bell Copper Company upon said Steinfeld being paid back the amount of such expenditure or any amount, with or without interest, the said Silver Bell Copper Company in consideration thereof to pay the assessment work to be done on said properties or any or either of them,
678 or that said Silver Bell Copper Company did pay all or any of the assessment work required to be done on said properties or any or either of them.

Defendants deny that the defendant the Silver Bell Copper Company expended large or any sums of money in the development of the properties or any of them alleged in paragraph IV of the third amended complaint to have been standing in the name of Albert Steinfeld and the Mammoth Copper Company. And defendants allege that the said Steinfeld and the said Mammoth Copper Company did give a license to the said Silver Bell Copper Company to extract ore from the said mines belonging to the said Steinfeld and the said Mammoth Copper Company, and that the said Silver Bell Copper Company in pursuance of such license did extract large quantities of ore from the said mines and did receive the profits and proceeds therefrom to its own use and benefit; and the defendants deny that the said Silver Bell Copper Company at all or any
679 times after the purchase of said properties by said Steinfeld was in the possession of or in the use or occupancy of the same or any thereof except as hereinbefore in this paragraph alleged.

The defendants deny that on the 20th day of May, 1903, or at any time the said Steinfeld presented to the said defendant, the Silver Bell Copper Company, the, or renewal of said alleged offer, to transfer said properties so standing in his name, or in the name of the said Mammoth Copper Company, or any thereof, upon his, the said Steinfeld, being paid the sum of \$18117 or any sum, and

deny that said alleged offer, or any offer, except as hereinafter in this paragraph set forth, on the part of said Steinfeld was then and there, or at any time, accepted by said Silver Bell Copper Company by resolution of the board of directors of said company entered in the minutes of said corporation or was accepted in any way whatever, or that the said Steinfeld as a member of the said board, or at all, voted in favor of the said alleged resolution, or of the acceptance of said alleged offer or tender, and allege that on or about

the said day, the said Steinfeld did make an offer to said
680 company to transfer said properties to the said company for the sum of \$18117 with certain modifications, conditions and provisions, and the said modifications, conditions and provisions were a part of the said offer, and that the said offer with said modifications, conditions and provisions, was accepted by said corporation acting by resolution of its board of directors, and that an agreement was executed between the said Steinfeld and the said Mammoth Copper Company on the one part, and the said corporation on the other part, which said agreement was executed on or about the 20th day of May, 1903, and is the agreement mentioned and described in paragraph V of the third amended complaint, and called therein "A memorandum in writing denominated an agreement," to which agreement these defendants refer as part of this answer, and a copy whereof is attached hereto, marked exhibit "B."

The defendants deny that no separate transfer or conveyance of any of said properties was made by said Steinfeld or said Mammoth Copper Company, and deny that on or about the 20th day of May, 1903, or at any time, the Silver Bell Copper Company, sold
681 to the Imperial Copper Company, a corporation, all or any of the properties described in said schedule exhibit "A" for the agreed price of \$515,000; and allege that on or about the said date the said Silver Bell Copper Company and the said Albert Steinfeld and the said Mammoth Copper Company did sell to said Imperial Copper Company certain properties, some of which belonged to each of them, for the full sum of \$515,000.

The defendants deny that the said Steinfeld and the Mammoth Copper Company or either of them joined in the deed to the Imperial Copper Company simply or for the purpose that the legal title to any of said properties which might be standing in the names of both or either of said parties, should be conveyed or transferred to said Imperial Copper Company; and deny that it was then or there, or at any time agreed by and between the said Silver Bell Copper Company, the said Imperial Copper Company and the said Steinfeld that the said \$515,000 purchase price of said properties was the property of the Silver Bell Copper Company or that
682 all or any of the cash or notes representing said purchase price or installments thereof were the property of the said Silver Bell Copper Company; and allege that the said Steinfeld and the said Mammoth Copper Company joined in said deed for the purpose of conveying to the said Imperial Copper Company the

title to all of the said properties which belonged to the said Steinfeld and the said Mammoth Copper Company.

Defendants deny that any money was paid or note or notes given to or received by the Silver Bell Copper Company for or an account of the said sale to the Imperial Copper Company; and allege that all moneys paid and notes given on account of the said sale were paid and given to the Silver Bell Copper Company in pursuance of the said agreement annexed hereto marked exhibit "B."

Defendants deny that the said Steinfeld out of the moneys received from the said Imperial Copper Company, paid to himself the sum of \$18,117, or any sum, and allege that the said sum was paid out of said moneys so received from the said Imperial
683 Copper Company by the said Silver Bell Copper Company to said Steinfeld in pursuance of, and as part consideration of the said agreement exhibit "B."

Defendants deny that the said Steinfeld received of or from the said Silver Bell Copper Company the sum of \$18117 or any sum as a full payment to him or to the said Mammoth Copper Company of all sums whatsoever or any sums which might be due or owing from said Silver Bell Copper Company for or on account of any or all interests that the said Steinfeld and the said Mammoth Copper Company or both or either of them had, or might have, in or to any of the said properties so listed and scheduled in said exhibit "A," and so sold and conveyed to said Imperial Copper Company or as a full payment of the said \$2000 paid by him to the said Neilson and Lewis, or either of them, and incorrectly and untruthfully alleged to have been advanced by him for said Silver Bell Copper Company; and deny that in accepting said sum of \$18117 the said Steinfeld and the said Mammoth Copper Company or either of them thereby released or relinquished to the said Silver Bell

Copper Company, any or all interests which either or both
684 might have had, or did have, in or to any of said properties so listed or described in said schedule exhibit "A," or satisfied or paid all or any indebtedness that was owing to him said Steinfeld for moneys alleged to have been advanced to or for said Silver Bell Copper Company, whether as alleged in paragraph IV of the third amended complaint or otherwise; and deny that the said Silver Bell Copper Company was indebted to the said Steinfeld in any sum; and deny that the said Steinfeld at any time advanced any money or moneys to or for said Silver Bell Copper Company as alleged in said paragraph of said amended complaint or otherwise.

V.

The defendants deny that the said Steinfeld, the Mammoth Copper Company and the Silver Bell Copper Company after the completion of the said sale to the Imperial Copper Company and the receipt of the said sum of \$115,000 in cash, and the four promissory notes, each for \$100,000, or on or about the 26th day of May, 1903, or not earlier than May 25th, 1903, or at any time, executed
685 a memorandum in writing denominated an agreement, as in paragraph V alleged, in or by which the said parties recited

over their signatures, that all or any of the proceeds of said sale, including the said notes and cash, were the property of the said Silver Bell Copper Company, and that the said Albert Steinfeld and the said Mammoth Copper Company had no interest whatever therein; and deny that said alleged memorandum so alleged to have been signed by the said parties was spread upon the minutes of a meeting of the said board of directors of said defendant corporation, the Silver Bell Copper Company, held after the 24th of May, 1903, or on or about the 25th of May, 1903, or at any time; and deny the interpretation of the said agreement as in paragraph V of the third amended complaint set forth; and allege that the paper attempted to be set forth and interpreted in said paragraph V of the third amended complaint and described therein as "A memorandum in writing denominated an agreement," is the agreement annexed hereto and marked exhibit "B"; and allege that

686 prior to the receipt of the said money and notes the terms of the said agreement were agreed to by the said Silver Bell Copper Company and the said Steinfeld, and that prior to the receipt of the said sum of money and notes, and on the 20th day of May, 1903, the said agreement was executed and ratified and approved by the board of directors of the said corporation, and a substantial copy thereof was spread upon the minutes of the said company; and deny that the same was done under the order, direction or control of said Steinfeld, or that said Steinfeld, controlled, directed or managed the other two directors.

Defendants admit and allege that the board of directors of the said Silver Bell Copper Company held a meeting on the 26th day of December, 1903, and passed a certain resolution wherein the said agreement was rescinded; and allege that said resolution as passed by the board is spread in full upon the minutes of the company; and the defendants deny that the said board did not attempt to rescind or did not rescind any other of the transactions of said meeting held on or about the 20th day of May, 1903, and entered in

687 the minute book as being held on the said 20th day of May, 1903, or particularly did not purport or attempt to rescind, or did not rescind the transaction by which the Silver Bell Copper Company repaid to or reimbursed the said Steinfeld, and the said Steinfeld received from the said company the said sum of \$18,117; and deny that any action or purported action on the part of said board of directors, except with reference to the custody of said money or funds was not consented to by the plaintiff, or that the plaintiff has not consented to or ratified the same; and deny that the same, because of the facts alleged in the amended complaint or particularly because of the alleged fact that neither said Curtis, Shelton or Steinfeld for the reasons alleged in the said complaint or for any reasons was competent to act as a director of said company in any transaction or dealing with Steinfeld, or at all, are not binding on said defendant corporation; and allege that the said agreement marked exhibit "B" and referred to in said third amended complaint as "A memorandum in writing denominated an agreement," was totally rescinded and that the resolutions

passed by the directors on said 20th day of May, 1903, and spread upon the minutes as having been adopted on said day were repealed, rescinded and annulled by virtue and in pursuance of the unanimous vote of all the stockholders of said defendant corporation, and in particular by the vote of the plaintiff, and that each and every act of the directors of the said corporation on the said 26th day of December, 1903, was done in pursuance and in consummation of the said unanimous action taken at said stockholders' meeting, which said stockholders' meeting was held on the 26th day of December, 1903, prior to the meeting of the directors; and allege that in pursuance of the action had at said stockholders' meeting and of the action of the said directors, an agreement was duly made, signed and executed by and between said Albert Steinfeld, the Mammoth Copper Company and the Silver Bell Copper Company whereby the said agreement marked exhibit "B" was rescinded and declared null and void ab initio; and further allege that prior to the execution of said agreement the said Steinfeld returned to the said Silver Bell Copper Company the said sum of \$18,117 and gave to the said Silver Bell Copper Company an order upon the Bank of California for the two notes deposited with said bank by the said Steinfeld and held by the said bank, and for the said sum of \$49,987.50, the balance of the proceeds collected by said bank and in its hands, and returned and paid over to the said Silver Bell Copper Company all proceeds of the said notes remaining in the hands of the said Steinfeld except such sums as had been paid out for or on behalf of the said Silver Bell Copper Company and except the sum of \$51,500 which had been garnisheed in the hands of said Steinfeld in a certain suit brought against the Silver Bell Copper Company by Selim M. Franklin of the city of Tucson; and that prior to the commencement of this action the Bank of California did deliver to the said defendant, the Silver Bell Copper Company, the said two notes and the said sum of \$49,987.50; and the defendants will produce upon the trial of this action the original book of the minutes of the meeting of the stockholders and of the directors of the Silver Bell corporation, and refer to the same and make the same a part of this answer.

Defendants deny that at the meeting of the stockholders of the company set forth and referred to on page 33 of the third amended complaint in paragraph V thereof, it was agreed and understood that the said contract marked exhibit "B" insofar only as it affected the custody and control of said money, should be rescinded; and deny that the disbursements and payment of any money by the said Curtis or the defendant company was wrongful; deny that the only matters discussed at said stockholders' meeting was the question of the custody of said money and the holding thereof by the said Albert Steinfeld as an indemnity to him for or on account of his guarantee to said Imperial Copper Company on the contract entered into with said Imperial Copper Company on the said 20th day of May, 1903; deny that no reference was made at said meeting of any other resolution than the two resolutions set

forth in said paragraph V of the third amended complaint on page 34 thereof; and deny that all discussions or actions taken at said meeting were intended to refer to such resolutions only and not

to any other resolution or resolutions adopted or passed at a
691 meeting held under date of May 20, 1903; deny that at said stockholders' meeting it was voted to rescind said resolutions set forth in said third amended complaint as aforesaid; and deny that it was voted to rescind any other or different resolutions; and deny that if the action taken at said stockholders' meeting had the effect on its face or at all of rescinding any other resolution or any other contract adopted on said 20th day of May, 1903, or under date thereof, or particularly the alleged contract entered into by the alleged acceptance of said alleged offer of said Albert Steinfeld as to the payment of said sum of \$18,117 or the payment thereof, such action was a mistake on the part of the plaintiff or was not intended as such, or was a mistake on the part of any of the other stockholders of said company present at said meeting, or was not intended as such; and the defendants allege that the action taken by the said plaintiff at said stockholders' meeting and his vote upon the resolution thereon was made after a full exposure to him and his counsel of all of the facts, minutes, resolutions and agreements

692 which had been made or passed by the said Silver Bell Copper Company and that said alleged mistake was not mutual and that said Silver Bell Copper Company intended to make a full and complete rescission of the said contract and resolutions passed on said 20th day of May, 1903; and for a further and separate defense to the said alleged mistake, the defendants alleged that such mistake, if any occurred, was made by the plaintiff, and the fact that he had made such mistake was discovered by the plaintiff more than one year prior to the filing of the second amended complaint herein, in which for the first time said alleged mistake was set forth and pleaded.

Defendants deny that the defendant Curtis, as treasurer of said company, at any or all times acted for or under the control or management of the said Albert Steinfeld, or that said Curtis as treasurer, without authority or right, paid to said Steinfeld out of the funds of the Silver Bell Copper Company the sum of \$145,763.75 or any sum, or delivered or caused to be delivered to said Steinfeld one

of said notes; and the defendants further deny that the
693 board of directors of the Silver Bell Copper Company on the 16th day of January, 1904, or at any time adopted any resolution wholly, or at all, under the control of the said Albert Steinfeld, or under his direction or management, or at his request, or as an act prepared by or for him; or that the action of the directors of the said company in paying or causing to be paid to the said Albert Steinfeld any note or moneys was without right, or that the said Albert Steinfeld, at any time appropriated or converted to his own use the sum of \$145,763.75 or any funds of the said Silver Bell Copper Company or any funds or note or notes belonging to the said Silver Bell Copper Company; and deny that the said board of directors on the said 16th day of January or at any time passed any

resolution to the effect that the said Silver Bell Copper Company, should deliver or cause to be delivered to the said Steinfeld any promissory note belonging to said corporation or to the effect that the said Steinfeld should retain as his own the sum of \$25,750, being one-half of the sum of \$51,500 in his hands belonging to the said Silver Bell Copper Company and garnisheered by one Franklin as its property, or any sum whatever.

The defendants deny that the said Steinfeld before the commencement of this action received the said sum of \$145,743.75 and the said notes or either of them, or the said sum of \$103,967 the proceeds of said note or the sum of \$25,750 as his own property and not as the property of any other person, firm or corporation, thereby converting said sum to his individual use or benefit, and not to the use or benefit of any other person, firm or corporation; and alleges that the said sum of \$145,743.75 and the said promissory note and the proceeds of the said promissory note were received by the said Steinfeld as belonging to himself and the defendant the Mammoth Copper Company as being one-half of the purchase price of the group of mines sold to the Imperial Copper Company, and as being a proportion thereof recognized by the board of directors of the company to rightfully belong to the said Mammoth Copper Company and to the said Steinfeld as the owners of the mines which were sold to the Imperial Copper Company, and which did not belong to said Silver Bell Copper Company, and that the said money and note paid to the said Steinfeld were paid by authority of the said Mammoth Copper Company and as its agent and was received by him in pursuance of such authority and as such agent.

VI.

Defendants deny that the board of directors of the said defendant, the Silver Bell Copper Company, acting under the management or controlled by said Steinfeld, subsequent to the said 10th day of January, 1904, or prior to the 16th day of January, 1904, or at any time, caused to be sold either of the said two promissory notes remaining unpaid, and allege that the said directors in selling said note acted independently and for the benefit of and for the best interests of the said defendant corporation; and deny that the said Steinfeld sold or discounted both of the said notes at the same time, and as one and the same transaction; and deny that the other officers of the said Silver Bell Copper Company had naught to do with the sale of either of the said notes; and deny that the said Steinfeld purported to act or, in fact did act, as the sole or only controlling officer or agent of the said defendant, the Silver Bell Copper Company; and allege that the said note belonging to the said Silver Bell Copper Company was sold for the best interests of and by the said corporation, and for its full value, and with the knowledge and consent of all the directors and officers of the said corporation.

VII.

Defendants deny that any funds or property of the said Silver Bell Copper Company *was* misappropriated or wrongfully or at all diverted.

Defendants admit that on the 20th day of January, 1904, the directors of the Silver Bell Copper Company passed a resolution declaring a dividend of \$111 upon each of the 1,000 shares of the capital stock of the said company, and that the said Albert Steinfeld received the dividend upon the said 300 shares of stock purchased from the said Neilsen as aforesaid; and deny that the said stock stood
in the name of Albert Steinfeld as trustee, for the benefit or as
697 the property of the said Silver Bell Copper Company; and deny that the said Albert Steinfeld being solely or at all in control of the said defendant corporation the Silver Bell Copper Company or of its directors or either of them, or of the said Curtis as treasurer thereof, caused to be paid to himself the sum of \$33,000 or that he caused to be issued to the said R. K. Shelton a check for \$111; and allege that the said sums were paid by the treasurer of the said company to the said Albert Steinfeld and to the said R. K. Shelton in pursuance of a resolution of the board of directors and in the fulfillment of his duty as treasurer.

The defendants deny that the defendants Shelton and Curtis agreed to pass any resolution whatsoever declaring any dividend, or that the resolution referred to declaring a dividend was a part of any other transaction or that it was agreed that there should be paid to Curtis the sum of \$111 per share on the 170 shares standing in his name on the books of the company, or that in passing the said resolution the said Curtis and Shelton or either of them acted under the control,
direction or management of the said Steinfeld; and allege
698 that the resolution was passed by the directors for the benefit of the stockholders of the corporation without any agreement or consideration whatsoever, and that the \$18,870 paid to Curtis was paid to him as the proper dividend upon the stock belonging to him and in pursuance of the said resolution.

Defendants deny that any moneys paid to Curtis or to Steinfeld or to Shelton were paid under any alleged agreement or arrangement entered into at any time whatsoever, or in particular at the time when the sum of \$145,743.75 was paid to Steinfeld, or the note for \$100,000 was turned over to him; or that any or all of said acts were done under or as a part of any contract, transaction, or agreement, or that the said sum of \$18,870 was paid to the said Curtis in consideration for his agreeing that Steinfeld should be paid the sums or for any consideration whatsoever.

Defendants deny that said Steinfeld out of the proceeds of said promissory note or of said cash, turned over to him including the said sum of \$33,000 or otherwise, paid to the said Curtis the
699 full share that 170 shares bears to 700 shares, or that said Curtis in fact received from said Steinfeld the full or any proportion of said cash and notes that he would have received if said money and note or either thereof had not been diverted or paid

to said Steinfeld but had been allowed to remain in the treasury of the said Silver Bell Copper Company and disbursed as dividends on all of the stock thereof; and deny that said Curtis did not give up to said Steinfeld as would appear from the reading of the record or otherwise, a sum approximating \$72,000, or received only the sum of \$18,870; and deny that said Curtis received from said Steinfeld the full amount of \$90,000 or its equivalent, in consideration of his voting as director on said 16th day of January or at any time or at the meeting held under such date, or at any meeting for the delivery to the said Steinfeld and the said Mammoth Copper Company of said cash and said promissory note.

VIII.

700 The defendants have no knowledge or information sufficient to form a belief as to the allegation in paragraph IX of the complaint contained, and, therefore, deny the same.

IX.

Defendants deny that at any of the times mentioned in the complaint, or any time whatever, the defendants acting as directors of the said Silver Bell corporation, or in any capacity attempted to divert from the funds of said corporation the sums mentioned in the complaint as paid to Steinfeld, Shelton and Curtis or any sum whatsoever; or that any or either of the defendants at any time knew that Steinfeld or the defendant, the Mammoth Copper Company, had no right, title, interest or estate in or to any of the properties described in schedule "A" annexed to the complaint, or knew that the said Mammoth Copper Company or Albert Steinfeld had no right to any money or property of the said Silver Bell Copper Company except such as Albert Steinfeld might have been entitled to by reason of his ownership of 250 shares of stock of the said company; or that the

701 said parties knew that the payment to the said Steinfeld of the sums of money in the complaint set forth and the delivery to him of the said note or either of said acts, was in violation of any right of the said corporation or of the plaintiff; or that the said acts of the defendants were done for the purpose of robbing the said corporation or of misappropriating or stealing its funds, or for the sole or only purpose of enabling the said Steinfeld to rob or steal from the plaintiff the share of the properties of the corporation which otherwise would be coming to the plaintiff as the owner of 250 shares of stock of said company or any share whatsoever; or that the defendants knew that they had no right to declare the said dividend of \$111 per share, the same being declared as a part of any alleged transaction or part of any alleged agreement whereby any moneys or notes were misappropriated, or that the said parties knew that in the declaration of said dividend and in the payment of the said moneys thereunder, they or either of them were violating their duties as directors of the said corporation or the duty or duties of any or either of them as such, or were using the position of any or either of them

as directors to enable any or either of them or the said
702 Steinfeld to appropriate to his own use wrongfully, illegally
or in violation of the rights of this corporation or of this
plaintiff the funds or property of this corporation.

Defendants deny that the Silver Bell Copper Company now has no
other property except that which is shown by the complaint to be
left in the treasury of the said corporation or that said property
consists of money which the said directors illegally, unlawfully or
inequitably are trying to force upon the plaintiff as his share of the
visible proceeds of the sale of the properties of the corporation.

Defendants deny that Curtis and Shelton or either of them are
under the control or management of the said Steinfeld or that any
moneys of the said corporation have been illegally diverted, misappropriated or stolen from the said corporation in any manner whatsoever,
or the said Steinfeld has control of the money or properties of the
said corporation now remaining, or will misuse such alleged power
or will misappropriate or wrongfully divert or convert the funds or
property of the said corporation in any manner whatsoever,
703 or that there is any necessity whatsoever for the appointment
of a receiver of the said corporation.

And for a further and separate defense to the said cause of action
in said third amended complaint set forth, the defendants allege that
the plaintiff and the said Silver Bell Copper Company were guilty
of laches in that they unduly delayed offering to pay to the said
Steinfeld the moneys which he had expended in purchasing the said
English group of mines in said third amended complaint mentioned
and in offering to assume the obligations which had been incurred by
the said Steinfeld in purchasing the titles thereto.

And for a further and separate defense to the first cause of action
in the third amended complaint set forth, the defendants allege that
the said alleged cause of action accrued more than three years prior
to the commencement of this action.

And for a further and separate defense to the said cause of action,
the defendants allege that the said cause of action accrued
704 more than four years prior to the filing of the seconded
amended complaint herein.

And for a further and separate defense to the said cause of action,
the defendants allege that the said cause of action accrued more than
four years prior to the filing of the third amended complaint.

And for a further and separate defense to that one of the two causes
of action set forth in one count in that portion of the third amended
complaint denominated as its first cause of action, the defendants
allege that the said cause of action and particularly in so far as the
facts constituting the same are in paragraph IV of said third amended
complaint set forth, accrued more than three years prior to the filing
of the second amended complaint.

And for a further and separate defense to that one of the two
causes of action set forth in one count in that portion of the third
amended complaint denominated as its first cause of action the de-
fendants allege that the said cause of action and particularly in so far

as the facts constituting the same are in paragraph IV of said third amended complaint set forth, accrued more than four years prior to the filing of the second amended complaint.

The defendants further answering the second cause of action in the third amended complaint set forth, allege and aver:

I.

The defendants hereby refer to paragraphs I, II, III, IV, V, VI, VII, VIII and IX of this answer, and by this reference make each and all of the denials, admissions and allegations contained in said paragraphs a part of this answer to the second cause of action, and hereby as a part of this answer to the second cause of action repeat each and every such denial and will allege each and all such allegations to be true.

The defendants deny that on the 29th day of June, 1900, or at any time, the defendant Steinfeld advanced to or for the benefit of the said Steinfeld the sum of \$2,000 for the purchase by Steinfeld as the trustee or managing agent of said Silver Bell Copper Company, or for the use or benefit of said Silver Bell Copper Company the said 300 shares of stock, or any thereof, issued to or belonging to said Carl Nielsen or for the purchase from said Nielsen or one Lewis, or either of them, of those two certain mines mentioned in the said complaint and known as the "Accident" and "Black Rock"; and deny that at the same time, or at any time, the said Steinfeld for said corporation entered into a contract with said Carl Nielsen and his wife Mary Nielsen or either of them, by which he agreed to pay to the said Carl Nielsen or Mary Nielsen, or either of them, the further sum of \$10,000 out of the proceeds of the workings of said Old Boot mine or at all; or, in the event that the same should be sold before such payment was made, should pay the same other than out of the proceeds of the sale thereof; and allege that the said contract was made by the said Steinfeld for his own use and benefit; and the defendants deny that the certificate for said stock was issued to said Steinfeld as trustee or in his own name, as trustee, except as hereinafter alleged, or that the same was being held by him, or was held by him as trustee as security for the repayment to him of said sum of \$2,000 so alleged to have been advanced the said corporation, or of any sum, or act or thing; and deny that for or upon said sum or any sum, he hereafter charged such corporation interest; and deny that he held said stock as security to him that there would be paid to the said Mary Nielsen or Carl Nielsen, or either of them, the said sum of \$10,000 or any sum, out of the proceeds of the workings of the Old Boot or out of the proceeds of the sale thereof in the event such mine should be sold before the proceeds of the workings of said mine should pay the sum of \$10,000 or at all; and the defendants allege that plaintiff without the knowledge or consent of the said Steinfeld took the certificate of stock which had been issued to said Carl Nielsen and which had been endorsed in blank by the said Nielsen, and which was the property of the said Albert Steinfeld, and pasted

the same in the stock book, and caused the same to be marked "canceled" and himself drew a certificate for 300 shares of stock to the order of Albert Steinfeld, trustee; and without the knowledge or consent of the said Steinfeld, represented to the said Curtis
708 and Shelton that the said certificate was so issued in the name of Albert Steinfeld, trustee, because the said Steinfeld held it as trustee and procured by such representation, and without the knowledge or consent of the said Steinfeld, the issuance of the said certificate to the said Steinfeld as such trustee; and that the said certificate of stock was at all times the property of the said Steinfeld personally and not subject to any trust whatsoever.

Defendants deny that the said Albert Steinfeld upon the execution of the said contract to the said Nielsen or thereafter, or at any time, executed to said Silver Bell Copper Company by writing signed by him acknowledge or declaring that he held said stock in his name as trustee as aforesaid, or for the purpose aforesaid.

And defendants deny that said Steinfeld paid to himself the said sum of \$2,000 so alleged to have been advanced by him to or for the use or benefit of the said corporation, with or without interest thereupon; and deny that long prior to the 16th day of January, 1904,
709 there was paid to said Mary Nielson as successor of George or Carl Nielson, the sum of \$10,000 out of the proceeds of the said mine, together with interest that might be due or owing thereon; and allege that the said Steinfeld paid the said sum of \$10,000 to the said Mary Nielson out of his own personal funds on or about the 25th of January, 1904; and deny that every and all or any obligation for which said stock is alleged to have been held by said Albert Steinfeld in trust were satisfied or fully performed or that any such trust ever existed; and deny that said alleged trust became or was fully or at all executed so that said 300 shares of stock prior to said 16th day of January, 1904, became the absolute or any property of the said Silver Bell Copper Company without any right, title or interest therein whatever to said Albert Steinfeld; and deny that any of said facts so denied were at all or any times known to defendants Curtis and Shelton or either of them.

Defendants deny that under the circumstances and conditions alleged, or set out in the second cause of action in the said third amended complaint contained or in furtherance of the alleged
710 arrangement or conspiracy therein set out, the said Steinfeld caused the directors of the Silver Bell Copper Company to vote to him a dividend on the said 300 shares of stock of \$111 per share or caused the officers of said company to pay said dividend to him; and deny that the sum of \$33,000 or any sum was paid to him as or for such dividend under or by virtue of said alleged arrangement; and deny that the defendants Shelton and Curtis and Steinfeld, as officers of said corporation or in any capacity, or any or either of them, well knew or at all knew that in paying the said Steinfeld the said dividend, they or any of them were violating their trust or obligation as directors or officers of said corporation, or that said Steinfeld had no right to the same, or that said \$33,000 was the money or property of the said Silver Bell Copper Company, or should not have

been paid to any person whatsoever; and deny that before the commencement of this action, or at the time said Steinfeld converted said \$33,000 or any part thereof to his own use or benefit.

And for a further and separate defense to that cause of
711 action denominated the second cause of action in the third amended complaint, defendants allege that said cause of action accrued more than two years prior to the commencement of this action.

And for a further and separate defense to that cause of action denominated the second cause of action in the third amended complaint, defendants allege that said cause of action accrued more than four years prior to the filing of the second amended complaint.

And as a further and separate defense to the said second cause of action in the third amended complaint set forth, the defendants allege that the plaintiff and the said Silver Bell Copper Company were guilty of laches in unduly delaying to pay the said Steinfeld the sum of \$2,000 expended by him in the purchase of the said 300 shares of stock, and in offering to assume the obligation incurred by the said Steinfeld to pay the sum of \$10,000 to the said Nielsons.

Wherefore the defendants demand that the plaintiff recover nothing by reason of this action and that the defendants recover their costs against the plaintiff.

FRANCIS J. HENEY,
EUGENE S. IVES,
Attorneys for Defendants.

712 TERRITORY OF ARIZONA,
County of Pima, ss:

Albert Steinfeld being first duly sworn, deposes and says; that he is one of the defendants in the above entitled action; that he has read the foregoing answer, knows the contents thereof, and that the same is true of his own knowledge except as to the matters therein stated to be alleged on information and belief and as to those matters he believes it to be true.

ALBERT STEINFELD.

Subscribed and sworn to before me this 6th day of January, 1908.
My commission expires May 9, 1911.

JOSIE B. HENDERSON,
Notary Public.

[SEAL.]

EXHIBIT B.

This agreement made this 20th day of May, 1903, between the Silver Bell Copper Company, a corporation organized and existing under the laws of the Territory of Arizona, party of the first part, and the Mammoth Copper Company, a corporation organized and existing under the laws of the Territory of Arizona, party of the second part, and Albert Steinfeld of Tucson, party of the third part, witnesseth:

Whereas, the parties hereto have this day agreed to sell certain mining claims and property to the Imperial Copper Company, a corporation, as per written agreements heretofore made, and deeds for which property are now in escrow with the Phoenix
713 National Bank of Phoenix, Ariz., and

Whereas, the parties hereto desire to settle and determine as between themselves, what disposition shall be made of the proceeds of said sale; and

Whereas, the said Albert Steinfeld has assumed certain obligations with the said Imperial Copper Company, as more fully appears in the various agreements heretofore entered into by him in making such sale, and particularly in a certain Guarantee Agreement, wherein, amongst other things, said Steinfeld guarantees the title to certain mining claims so sold or agreed to be sold, and the parties of the first and second part desire to indemnify him against loss by reason of any of the said matters or things so done by him.

Now, therefore, in consideration of the premises, and of the sum of one dollar (\$1.00) by each of the parties hereto to the other in hand paid, receipt whereof is hereby acknowledged it is hereby mutually agreed that the purchase price paid and to be paid
714 upon the sale, shall belong to and be the property of the said Silver Bell Copper Company.

And it is further agreed that the four promissory notes of one hundred thousand dollars (\$100,000.00) each, this day executed by the Imperial Copper Company to the Silver Bell Copper Company, upon said sale, as well as the proceeds of said promissory notes when collected, shall be held by the said Albert Steinfeld as trustee, and as security for, and indemnity against loss, damage or expense which may arise to him for or out of, or by reason of any and all obligations and liabilities which he has assumed with the said Imperial Copper Company or any other person whatsoever.

And it is further agreed that no dividend shall be declared by the said Silver Bell Copper Company until the stockholders of said company shall first have fully indemnified said Albert Steinfeld against loss which might arise to him in the future, from or on account of any such obligations or liabilities so assumed by him.

In witness whereof, the said corporations, parties of the
715 first and second part, has caused these presents to be signed by its President and Secretary, and its corporate seal to be hereunto affixed by resolution of its board of directors, and the said Albert Steinfeld has hereunto placed his hand and seal the day and year first above written. In triplicate."

(Filed January 6, 1908.)

(Title of Court and Cause.)

Stipulation as to Affirmative Allegations in Defendants' Answer.

It is hereby stipulated that all affirmative allegations contained in the answer of defendants to plaintiff's third amended complaint, are for all purposes of this action deemed to be denied by plaintiff,

and that plaintiff need not serve or file any replication setting forth or containing such denials.

Dated, Tucson, Arizona, January 7, 1908.

FRANK H. HEREFORD,
EDWIN A. MESERVE,
Attorneys for Plaintiff.
FRANCIS J. HENEY,
EUG. S. IVES,
Attorneys for Defendants.

Filed Jan. 7, 1908.

716 *Minute Entries of the Trial Court.*

In the District Court of the First Judicial District of the Territory of Arizona in and for the County of Pima.

No. 3483.

LOUIS ZECKENDORF, Plaintiff,

vs.

ALBERT STEINFELD, R. K. SHELTON, J. N. CURTIS, SILVER BELL Copper Company, a Corporation, and Mammoth Copper Company, a Corporation, Defendants.

* * * * *

And afterwards, and upon to-wit: the sixth day of January, A. D., 1908, the same being one of the regular juridical days of the October 1907 Term of Said Court, the following order, inter alia, was had and entered of record in said Court in said cause, which said order is in words and figures as follows, to-wit:

* * * * *

And afterwards, and upon to-wit: the same day, the following other order was had and entered of record in said Court in said cause, which said order is in words and figures as follows, to-wit:

717 LOUIS ZECKENDORF, Plaintiff,
vs.
ALBERT STEINFELD et al., Defendants.

This cause came on this day regularly for trial before the Court sitting without a jury, a trial by jury having been in open Court expressly waived by the Respective parties hereto, Edwin A. Meserve, Esq., and Frank H. Hereford, Esq., appearing as counsel for the plaintiff, and Francis J. Heney, Esq., and Eugene S. Ives, Esq., for the defendants, and both parties announce ready for trial. Whereupon, by request and consent of counsel for the respective parties hereto, it is ordered that the record of the evidence, admissions and stipulations in the former trial of this case shall constitute the record at this trial, together with such papers as have been

filed by the respective parties hereto since the record in the former trial was completed, subject to certain stipulations entered into by the parties hereto, and the plaintiff then rested his case. The defendants then rested their case. * * *

718 In the District Court of the First Judicial District, Territory of Arizona, in and for the County of Pima.

Findings of Fact.

(Title of Cause.)

This cause came on regularly for trial before the Court, Honorable John H. Campbell, Judge thereof presiding, sitting without a jury (a jury having been theretofore regularly waived by all parties) on the 2nd day of January, 1908, all parties being present in person, and also by their attorneys; evidence oral and documentary having been regularly introduced and offered by the respective parties and received by the Court, the cause was in regular order and in due course and form argued to the Court, and submitted to it for its decision; after due consideration of the pleadings and of all admitted evidence in the case, and being fully advised in the premises the Court now finds the following facts in the case:

I.

That in the month of January, 1899, the Neilson Mining & Smelting Company, a corporation, was duly and regularly organized under and by virtue of the laws of the Territory of Arizona, with its principal place of business in the City of Tucson, County
719 of Pima, said Territory; a true copy of its Articles of Incorporation and By-Laws appear in the evidence as exhibits, pages 515 and 622, Abstract of Record. That on the 14th day of January, 1901, the name of said corporation was regularly and duly changed to the Silver Bell Copper Company. That said Silver Bell Copper Company is the defendant in the above entitled action and that at all times herein mentioned it has been and is now a corporation, duly organized, existing and doing business under and by virtue of the laws of the Territory of Arizona, with its principal place of business in the City of Tucson, said Territory. That at all the times mentioned in these findings subsequent to the 14th day of January, 1901, Albert Steinfeld, J. N. Curtis and R. K. Shelton, have been and now are the directors of said corporation, all of said parties being residents of the City of Tucson, County of Pima, Territory of Arizona.

That plaintiff is now and for all the times herein mentioned has been a resident of the City of New York, State of New York.

720 That the said defendant, the Mammoth Copper Company, is now and for all of the times involved in this action has been a corporation, organized and existing under and by

virtue of the laws of the Territory of Arizona, having its principal place of business at Tucson, Pima County, said Territory. That the defendant, Albert Steinfeld, is now and for all of the times mentioned or involved herein, and ever since the organization of said corporation, has been the owner in fact of all of the capital stock of said Mammoth Copper Company and any stock standing in the name of any other party was placed in his name in order to enable such party to qualify as a director and was held by said party for that purpose alone, said stock at all times in fact belonging to and being the property of said Albert Steinfeld. That said Mammoth Copper Company at all times was but an instrument in the hands of the said defendant Albert Steinfeld, used by him for the purpose of transacting certain business for himself that he did not care to transact in his own name; that any money which may on its face have been paid to the defendant, Albert Steinfeld, and any property which may on its face have been delivered to the said Albert Steinfeld for said Mammoth Copper Company, or for the benefit of the said Albert Steinfeld and the said Mammoth Copper Company, in fact and in truth were paid and delivered to the said Albert Steinfeld as his own individual property and were appropriated by him to his own individual use. That all acts and things done in the name of the said Mammoth Copper Company, and all things and property received, given or paid by or to or in the name of said Mammoth Copper Company, were in fact but acts, things and property done, received, given and paid by and to and for the benefit of the said Albert Steinfeld.

II.

That the ownership of the stock of said Nielson Mining & Smelting Company, or the Silver Bell Copper Company, at all times was as follows, viz: upon the organization of said Company, all of the stock of said Company was regularly issued to Carl Nielsen, in consideration of the transfer by said Carl Nielsen, to said Company of his rights in the hereinafter mentioned Old Boot or Mammoth mine, and of the transfer of certain personal property used in working said mine; that immediately thereafter, said stock was divided as follows: 499 shares to and in the name of L. Zeckendorf & Company; 30 shares in the name of Albert Steinfeld, Trustee, being held by him in trust for and as the property of William and Julia Zeckendorf; 170 shares in the name of and belonging to J. N. Curtis; 300 shares in the name of and belonging to Carl Nielson, and 1 share in the name of R. K. Shelton, but belonging to, and the property of L. Zeckendorf and Company; that in January, 1901, the 300 shares of said stock standing in the name of Carl Nielson were transferred on the books of the Company to the name of Albert Steinfeld, Trustee. That on the 6th day of June, 1903, the 499 shares standing in the name of L. Zeckendorf & Company were divided as follows: 250 shares thereof being issued to and in the name of L. Zeckendorf, the plaintiff in this action; 249 shares being issued to and in the name of Albert Stein-

feld, said Albert Steinfeld taking unto himself the ownership of the one share still standing in the name of R. K. Shelton, the certificate therefor at all times after being issued being in the possession of said Albert Steinfeld until December 9th, 1903, when, as hereinafter found, the same was given to said R. K. Shelton by the said Steinfeld, said R. K. Shelton then for the first time being put in possession of the certificate for said one share of stock; that the said R. K. Shelton never had any other or different interest in said Silver Bell Copper Company. That at all times and in all meetings of the stockholders of the said company said Albert Steinfeld voted all stock standing in his name as trustee or otherwise, and all stock standing in the name of L. Zeckendorf & Company; that L. Zeckendorf in person or by individual proxy never was at any stockholders' meetings of said company or voted any stock until the stockholders' meeting hereinafter mentioned, held on the 26th day of December, 1903. That at no time prior to June 6, 1903, was plaintiff a stockholder in the Nielsen Mining & Smelting Company or the Silver Bell Copper Company in his own right, but at all times hereinbefore mentioned the stock issued to L. Zeckendorf & Company stood in the name of and was the property of the copartnership of L. Zeckendorf & Company, and was voted and controlled by Albert Steinfeld as the managing partner of said copartnership, and the said L. Zeckendorf & Company had full and complete knowledge, through Albert Steinfeld, its managing partner, of all of the acts and things heretofore and hereafter found as having been done and performed prior to the 6th day of June, 1903.

III.

That defendant R. K. Shelton at all of the times involved in this action and ever since the incorporation of said Nielsen Mining & Smelting Company, or Silver Bell Copper Company, has been and is now but the representative of the said Albert Steinfeld on the Board of Directors of said Company, and at all times involved in this action voted as ordered, directed and requested by said Albert Steinfeld and not otherwise. That as Secretary of said corporation, said R. K. Shelton at all times did as ordered, directed and requested by said Albert Steinfeld. That for all the times subsequent to June 6th, 1903, said J. N. Curtis as a director and other officer of the said Silver Bell Copper Company was under the complete dominion and control of said Albert Steinfeld and as such director or other officer did whatsoever said Steinfeld requested or directed. At no time and under no circumstances subsequent to June 6th, 1903, did the said J. N. Curtis as director or other officer of the said corporation, do any act, take any step or cast any vote except as requested or directed by the said Albert Steinfeld. That Albert Steinfeld at all of the times involved in this action and mentioned in these findings was in fact in complete control of Nielsen Mining & Smelting Company and of said Silver Bell Copper Company, and in absolute control and direction of its business, property and affairs.

That the power of Albert Steinfeld over the Silver Bell Copper Company, and over the directors and officers thereof up to the month of June, 1903, arose out of the following facts and conditions, viz: the fact that said Company was heavily indebted to L. Zeckendorf & Company, and that L. Zeckendorf & Company and William and Juila Zeckendorf held a majority of the stock of the said company, said Albert Steinfeld as the managing partner of said L. Zeckendorf & Company having the power to control said indebtedness and to vote said stock of said L. Zeckendorf & Company and as trustee of William and Julia Zeckendorf having the power to vote said stock of William and Julia Zeckendorf, and the fact that after January 14, 1901, as trustee of the Silver Bell Copper Company in the ownership of the 300 shares of stock purchased from the Neilsens, he assumed and was accorded by Curtis and Shelton the right and power of voting and did vote that stock.

IV.

That because of the facts herein found, it at all times would have been an idle and useless act for the plaintiff to make any demand whatsoever on the said Silver Bell Copper Company or on its Board of Directors or any of them to bring any action against the said Albert Steinfeld, the said J. N. Curtis or the said R. K. Shelton, particularly any action for the recovery of any property of said corporation, or any property claimed to belong to said corporation, or for the payment to said corporation of any debt owing by said parties or either of them, and particularly any action against the said

Albert Steinfeld in favor of said corporation to recover any property or to redress any wrong done to said corporation by him, and for said reasons it would have been a useless and idle act for the plaintiff to have demanded of said Board of Directors that this action be brought by the said corporation against the said J. N. Curtis, R. K. Shelton and Albert Steinfeld, and if any such action had been brought by said corporation it would not have been prosecuted in good faith nor for a full recovery thereon, nor for the benefit of said corporation or this plaintiff as a stockholder thereof; and for such reasons and because of such facts and because it would have been an idle and purposeless act so to do, plaintiff made no demand whatsoever on said corporation or on the Board of Directors thereof, that it bring this or any action against said defendants or that it prosecute the same, and plaintiff in bringing and prosecuting this action brought and prosecuted the same as a stockholder of said defendant Silver Bell Copper Company for its use and benefit and in order that its property illegally taken from it, as herein found, might be recovered and restored to its assets.

728

V.

That ever since the year 1878 this plaintiff and defendant Albert Steinfeld were partners, doing business in the City of Tucson, under the name of L. Zeckendorf & Company, under the terms and con-

ditions of the articles of partnership and amendments thereto existing between them, which are in evidence and marked exhibits—

Zeckendorf made visits from time to time to Tucson and upon such visits inspected the business of the copartnership and shared and directed in its conduct, and such was the condition at all times up to and including the commencement of this action; that plaintiff, at all said times, was a resident of the City of New York, State of New York, and said Albert Steinfeld was a resident of the City of Tucson, County of Pima, Territory of Arizona, and that during all of said times said Albert Steinfeld was the General Manager of the said business of L. Zeckendorf & Company and as such was in actual and active control of its business and its business affairs in said Territory, and employed and discharged all of its help and gave and ex-
729 tended all credits and determines its business policy in all matters and things in said Territory of Arizona and in connection with its business therein. That plaintiff attended to and managed the business of said firm in New York, particularly the purchasing of the goods and merchandise handled by said firm.

That for some time prior to the 14th day of January, 1899, William and Julia Zeckendorf were the owners of what is known as the Mammoth, or the Old Boot Mine, being one of the mines hereinafter listed and mentioned; that the legal title to said mine stood in the name of Albert Steinfeld, he holding the same as trustee for said William and Julia Zeckendorf. That for some time prior to said 14th day of January, 1899, one Carl Nielsen had a working contract on said mine, executed by said Albert Steinfeld as the ostensible owner thereof, but for the real use and benefit of said William and Julia Zeckendorf, under and by virtue of which said Nielsen was to have the right to operate said mine and to take the ores therefrom and to pay to said Steinfeld, for the use and benefit of said William and Julia Zeckendorf, certain royalties on all ore extracted
730 from said mine. That during the operation of said mine, said Albert Steinfeld, as the manager of said L. Zeckendorf & Company, and in actual control of the business of said partnership, advanced and extended to said Carl Nielsen certain credits, and sold to him on credit large amounts of merchandise, resulting in said Carl Nielsen on and prior to the 14th day of January, 1899, becoming indebted to said L. Zeckendorf and Company in a large sum of money.

That defendant J. N. Curtis, during the time herein last above mentioned, was in the employ of L. Zeckendorf & Company, and in charge of its mines and mining properties, and at all said times took active personal charge of its mines and mining properties and attended to the direction of same and to the sales thereof; and received as his compensation for such work certain pay for his time and certain commissions on sales of mines that might be made by him, or through or under his influence or by his help and assistance.

That on or about the 14th day of January, 1899, in order to protect said indebtedness so owing to said L. Zeckendorf & Company by said Carl Nielsen, said Albert Steinfeld caused the
731 Nielsen Mining & Smelting Company to be incorporated,

under the laws of the Territory of Arizona. That thereafter William and Julia Zeckendorf, through the said Albert Steinfeld as trustee, gave an option to said Nielson Mining & Smelting Company on the said Mammoth or Old Boot Mine, for an agreed price of twenty-five thousand (\$25,000) dollars, to be paid to said William and Julia Zeckendorf in installments of twenty-five hundred (\$2,500) dollars each, to be paid each three months; said Carl Nielsen had previously thereto transferred to said Nielson Mining & Smelting Company his working contract on said mine above mentioned and also transferred all personal property used on and in connection with said mine and the operation thereof, and said Nielsen Mining & Smelting Company assumed said indebtedness owing to said L. Zeckendorf & Company by said Nielsen, and the same was then charged on the books of said L. Zeckendorf & Company by and on the order and under the direction of said Albert Steinfeld, to the said Nielsen Mining &

Smelting Company, and the same was thereafter carried on
732 the books of L. Zeckendorf & Company in the name of

Nielson Mining & Smelting Company (until its name was changed to the Silver Bell Copper Company, and thereafter in such name), and at the same time L. Zeckendorf & Company released said Carl Nielsen from all personal obligation on said indebtedness; that thereupon the stock of the said Nielsen Mining & Smelting Company was divided as heretofore found, the 170 shares which were given to said J. N. Curtis were given to him by L. Zeckendorf & Company as compensation for his services in connection with said transfer and services to be performed by him for said Silver Bell Copper Company. That the directors of said company thereupon elected were said J. N. Curtis, Carl Nielsen and R. K. Shelton; that said Carl Nielsen was elected the nominal general manager and superintendent and J. N. Curtis the president and said R. K. Shelton the secretary of said Company; but at all times thereafter, prior to June 6th, 1903, said Albert Steinfeld, as managing partner of L. Zeckendorf & Company, assumed to be the general manager of said company and assumed the power of directing its affairs and of controlling

733 all of its actions, and said assumption of power on the part of the said Albert Steinfeld was assented to and acknowledged by the said J. N. Curtis, Carl Nielsen and R. K. Shelton, and L. Zeckendorf. That all matte, bullion and other mineral products obtained from the said mines, which were shipped or sold, were shipped or sold through the firm of L. Zeckendorf & Company and the proceeds thereof received by said firm and credited by it upon the indebtedness to it of said corporation.

VI.

That said Nielsen Mining & Smelting Company, upon said transfers by Nielsen to it being complete and in January, 1899, entered upon the work of the development of said Mammoth or Old Boot Mine, said Carl Nielsen as superintendent being in actual charge thereof. That under said operation, large bodies of ore in said mine were developed and were found to extend to within such a distance

of the southern boundary line thereof, being the dividing line between said mine and the Prospector Mine, one of the mines belonging to the English group of mines hereinafter referred to, that it became evident that said ore bodies then developed
 734 underneath the ground in said Mammoth Mine ran into said Prospector Mine, and other of said English group of mines, the said facts being ascertainable alone from an examination and inspection of the underground workings of said Mammoth or Old Boot Mine.

That in the year 1900 the said J. N. Curtis on the order and direction of said Albert Steinfeld took up in his own name other mines about and adjoining said Old Boot Mine, all for the use and benefit of said Nielsen Mining & Smelting Company, or Silver Bell Copper Company, and the same were carried by said J. N. Curtis thereafter in his own name, but as the property of and for the use and benefit of said Silver Bell Copper Company, said mines being included in the list of mines sold to the Imperial Copper Company as hereinafter found.

VII.

That during all the times herein mentioned those mines known as the English group of mines, being a part of the mines described in Finding XXII and specially so listed therein, surrounded said properties of the Silver Bell Copper Company. That the
 735 beneficial ownership of said mines was in certain parties resident in England, from which fact the said mines came to be known as the English group of mines. That one Francis and one Volkert claiming that said mines were open to location had filed locations on the same and were claiming title thereto; that this condition of ownership by said parties continued through the year 1899 and through the year 1900, up to the time of the purchase by Albert Steinfeld, hereinafter mentioned, of what is known as Francis & Volkert titles and the English title thereto. That the Francis & Volkert claims to said mines were initiated on or about the 1st day of January, 1900. That said Mammoth or Old Boot Mine, during the fall of the year 1899 and up to the time of the closing of said mine in the spring of 1900, was being worked at a substantial profit. That at said time said Nielsen Mining & Smelting Company was indebted to said firm of L. Zeckendorf & Company in an amount approximating thirty thousand dollars (\$30,900.00) over and above the value of all matte and bullion then on
 736 hand or in transit, for moneys which had been advanced by said L. Zeckendorf & Company to said Nielsen Mining & Smelting Company, to enable it to develop and open up said mine and to buy machinery, mills and other property necessary for the working of said mine and the handling of ores taken therefrom, and also for certain goods, wares and merchandise sold by said L. Zeckendorf & Company to said Neilson Mining & Smelting Company.

VIII.

That in the fall of 1899, said J. N. Curtis, the then President of said Nielsen Mining & Smelting Company, advised and informed said Albert Steinfeld that the developments of said Mammoth Mine showed that the ore bodies therein, (the same being underground and undeveloped and, except as thus shown, unknown) would run into said Prospector Mine and other mines belonging to said English group of mines, and that said underground workings of said Mammoth Mine showed that there were probably great values in said English group of mines: That at about the same time said Albert

Steinfeld became dissatisfied with the management of said
 737 Carl Nielsen and with his work as superintendent and general manager of said mine; and thereupon and in the month of December, 1899, said Albert Steinfeld, without action of or authority from the Board of Directors of said Company, assumed to and did discharge said Carl Nielsen as general manager and superintendent of said mine, notwithstanding that he had been elected by the Board of Directors of said Company; and at the same time ordered said Mammoth Mine to be closed down and all work therein to be stopped, as soon as the coke and ore on hand should be used up. His controlling purpose in so doing being to obtain from Nielsen for the corporation the ownership of the said 300 shares of stock then owned and held by him, and in order that the English group of mines, so-called, and the Francis-Volkert titles thereto might be purchased at a nominal or small sum, without the owners thereof obtaining knowledge through the workings of said Mammoth Mine and the showing of ore bodies therein, that said ore bodies probably did and would extend into said English group of mines; and said mine was not shut down because said mine could not have

738 been worked at a profit, for the same could have been worked at a substantial profit; and that all of the said acts and purposes of said Steinfeld were communicated by him to the said L. Zeckendorf at the time the said acts were done or the said purposes formed.

IX.

That said J. N. Curtis as the President of said Nielsen Mining & Smelting Company, prior to said time, had frequently advised and notified said Albert Steinfeld, and said Albert Steinfeld at all times had known, and said Zeckendorf had been told and informed by said Steinfeld that it was very desirable that said English group of mines, so-called, should be purchased, in order that all of the mines and mining claims surrounding said Mammoth Mine should with it constitute one group, and in order that the whole thereof might be sold as one group and one property, as any intending purchaser would, upon examination of said Mammoth Mine, soon ascertain that the ore bodies therein probably extended into said English group of mines; and because of the fact that all purchasers
 739 of large mining properties desire to control all claims immediately surrounding any developed mine or mines.

That said Albert Steinfeld, before ordering said mine to be closed, and work thereon to be stopped, visited said mine and examined the same, and ascertained and learned the truth of the statement so made to him by said J. N. Curtis, both as to the ore bodies in said mines and their tendencies, as above found and also as to the necessity of acquiring title to said English mines, so that all of said mines and mining properties described in said Finding XXII could or might be sold as one group and one property. That said Albert Steinfeld acquired said information because of the fact that he was acknowledged and conceded to be the actual manager of said Nielsen Mining & Smelting Company, and because of his assumption of such power and of such position, and that he acquired said knowledge and information solely from said J. N. Curtis, the President of the Nielsen Mining & Smelting Company, and from a personal examination of said mine made by him as such assumed and acknowledged actual manager of said company. That said Nielsen being discharged as said superintendent and
740 manager, the personal control of said mine was then, by direction of said Steinfeld, placed in said J. N. Curtis, as the President of said Nielsen Mining & Smelting Company.

X.

That under date of the 16th day of May, 1900, said Steinfeld entered into an agreement in writing with the said Francis and Volkert, said agreement being hereafter set out in full in Finding XVII attached to and as a part of the July 15, 1901, proposal or option. (Ex. 137.)

That thereafter and in pursuance of said agreement the interest of said infant children was conveyed to said Mammoth Copper Company for said Steinfeld, and he paid the said sum of \$625 therefor; that the said sum of \$1,875 and \$625 so paid by said Steinfeld, were the personal money of said Steinfeld.

XI.

That on or about the 29th day of June, 1900, said Albert Steinfeld purchased from the said Carl Nielsen the said three
741 hundred (300) shares of stock belonging to said Carl Nielsen, and purchased from said Carl Nielsen and one Lewis two certain mines they had and all mines and mining claims that said Carl Nielsen might have in the mining district in which were located said Mammoth, or Old Boot Mine, said mining district being known as the Silver Bell Mining District. That the purchase price paid and agreed to be paid for said two mines and mining properties and said three hundred shares of stock was the sum of two thousand (\$2,000) dollars cash then paid, and the sum of ten thousand (\$10,000) dollars, agreed to be paid out of the proceeds of the working of said Old Boot or Mammoth Mine, or the proceeds of the sale of said mine, in the event the same should be sold before said sum should be paid out of the proceeds derived from the working of said mine: That said contract, on the direction of the

said Albert Steinfeld, was signed by himself individually and by said Nielsen Mining & Smelting Company. That said sum of ten thousand (\$10,000.00) dollars on January 24, 1904, was paid by said Steinfeld, to Mary Nielsen, the successor of Carl Nielsen and one of the parties to said contract: That said Albert Steinfeld took said 300 shares of stock in his name as "trustee" and all times after January 19th, 1901, held said stock in his name as such trustee, but for the Silver Bell Copper Company said Silver Bell Copper Company during all such times and now being the equitable and real owner thereof.

XII.

That said Albert Steinfeld, after closing down said mine and after purchasing said Nielsen stocks and interests and mines and said Francis and Volkert interests, proceeded in September, 1900, to England and there concluded to purchase of the English titles to said English group of mines, including the purchase of the equitable, as well as the legal title thereto, paying therefor the sum of five thousand (\$5,000.00) dollars. That said sum of \$5,000 (five thousand) so paid for said English group of mines, and said sum of twenty-five hundred (\$2,500.00) dollars paid to said Francis and Volkert, were amounts very much less than said mines could probably have been purchased for, if the owners of said English titles to said group of mines and said Francis and Volkert titles thereto, or either, had become possessed of the knowledge which said Albert Steinfeld had acquired, as hereinabove found of the tendency of the ore bodies in said Mammoth or Old Boot Mine.

XIII.

The said Steinfeld in purchasing the said English group of mines from the said Francis and Volkert and from the said English owners did not purchase the same with the then intent that thereby they should become and be the properties of the Silver Bell Copper Company but at the times of the said purchase the said Steinfeld intended to take the properties as his own, but with purpose to offer to the said Silver Bell Copper Company an opportunity to take said mines and said properties upon the said Silver Bell Copper Company reimbursing him for the outlays and expenditures which he would have and had been put to in acquiring the same, and said Steinfeld expected that the said Silver Bell Copper Company would take over the said properties, the said Steinfeld intending on his part that in the event the said corporation did not take over the said properties and so reimburse him he would keep said properties for and as his own.

XIV.

That after acquiring said Francis and Volkert titles to said mines, and prior to his going to Europe, said Albert Steinfeld directed that the said Mammoth or Old Boot Mine be again put in operation and again worked, and thereupon and thereafter it and the adjoining

mines as one property were worked and operated by the said Silver Bell Copper Company. That by the time said mine was reopened the price of copper had so depreciated that the profits that could be derived from the workings of said Old Boot Mine and adjoining mines were very much less than at the time said Old Boot mine was closed down by Steinfeld in the spring of 1900 as above found.

That in January, 1900, said Steinfeld caused the development work upon said mine to be stopped; the smelter, however, was run until some time in February, 1900, at which time all the coke and supplies necessary for the operation of the smelter and substantially all the ore which had been developed prior thereto, were exhausted, and that if said development had not been stopped by said Steinfeld but had been continued during the operation of said smelter, sufficient ore would have been developed to have kept the smelter continuously supplied, and in consequence thereof said Silver Bell Copper Company sustained great damage.

XV.

That in the early part of 1901, the question as to the ownership of the 300 shares of stock purchased from Nielsen by Steinfeld and of the English group of mines arose between Steinfeld and Curtis as president of the Silver Bell Copper Company, Steinfeld claiming the absolute ownership of both the shares of stock and of the mines, and Curtis claiming that Steinfeld held the same in trust for the company. Curtis thereupon consulted S. M. Franklin, the company's attorney, and was advised by Franklin that Steinfeld held both the stock and the mines as the trustee for the corporation, and Steinfeld was so advised. That upon receiving this advice 746 Steinfeld demanded of Curtis that interest be paid to him by the company on the sums of money expended by him in the purchase of stock and of the mines, as is evidenced by a letter written by said Steinfeld to Curtis, dated May 19, 1901. Curtis, as the treasurer of the company, signed checks for such interest and sent them to Steinfeld. After the receipt of such checks by Steinfeld he consulted with said Franklin as to his rights; he was advised by Franklin that because of his relations with the company he had no legal right to make the purchases for his own benefit; but, on the other hand had no right to compel the company to assume such purchases; that it was his duty to give to the company an opportunity at a meeting of the stockholders at which L. Zeckendorf should vote the L. Zeckendorf & Co. shares within a reasonable time to reimburse him for his outlays, and to take over the property if he so desired; and that if the company should not avail itself of this offer, Steinfeld could then hold the properties as his own. After receiving said advice Steinfeld returned the checks for the interest to Curtis.

747

XVI.

That in the year 1900, immediately upon acquiring said two mines from said Nielsen and Lewis and the said English group of

mines, said Steinfeld, as the same were acquired, turned same over to the possession of the said Nielsen Mining & Smelting Company, and said Nielsen Mining and Smelting Company thereupon assumed the possession and control thereof.

That said J. N. Curtis, as president of said Silver Bell Copper Company, upon and after said mines were turned over as aforesaid to said Silver Bell Copper Company from time to time prepared various maps for and under the direction of said Albert Steinfeld, showing all of said mines named in Finding XXII as one property and one entire group of mines, and as the mines and properties of said Silver Bell Copper Company; and said J. N. Curtis, as president of said Silver Bell Copper Company, on the direction of said Albert Steinfeld, from time to time prepared various reports of "all of the properties of said Silver Bell Copper Company" and included in said reports all mines mentioned in Finding
 748 XXII without in any manner segregating or separating the same into groups, and as being properties of said Silver Bell Copper Company.

XVII.

That under date of July 15th, 1901, in order to bring the matter of the purchase of the properties hereinbefore referred to formally before the stockholders of the company for action, said Albert Steinfeld delivered to the secretary of said Silver Bell Copper Company a document or proposal dated of said date in the words and figures following, viz:

"TUCSON, ARIZ., July 15th, 1901.

"Silver Bell Copper Company, (Formerly Nielsen Mining and Smelting Company,) Tucson, Arizona.

GENTLEMEN: On May 16th, 1900, I entered into a contract with Margaret Francis and Julius Volkert in regard to certain mining claims and mill sites situated in the Silver Bell Mining district, Pima County, Arizona, claimed by them and which are situated
 749 either adjoining or near to the Mammoth mine, or better known as the Old Boot mine, which is being operated by your company, a copy of which agreement is hereto annexed.

In pursuance of this contract I have caused to be conveyed to the Mammoth Copper Company, the corporation mentioned in the agreement, all the interest of the said Margaret Francis and Julius Volkert as well as the interest of the minor heirs of John Francis, deceased, and in consideration therefor, I have received the following, to-wit:

1. Nine hundred and ninety-seven shares of the full paid up and non-assessable stock of the said Mammoth Copper Company, being all the shares of the capital stock of that corporation, except the three shares held by its directors.

2. The promissory note of said corporation, dated June 8th, 1900, payable to my order one year from date for the sum of \$2,780, with interest thereon from its date until paid at one per cent per month.

750 3. The promissory note of said corporation, dated June 8th, 1900, payable to my order or demand, for \$12,500 with interest from demand at the rate of one per cent per month.

4. A mortgage executed by said corporation on all said mining claims and mill sites, as security for the payment of said two promissory notes.

5. The written agreement of said corporation, dated June 8th, 1900, wherein it agrees to do and perform all the matters and things by me agreed to be done and performed in the said contract of date May 16th, 1900, a copy of which agreement of date June 8th, 1900, is hereto annexed.

The first mentioned promissory note being for the payment of the sum of \$2,780.00, represents the actual amount of money paid by me to Margaret Francis, individually and as guardian for her children, and to Julius Volkert for their deeds to the mining claims and mill sites mentioned in their agreement, to-wit: \$2,500.00 for the deeds and \$280 or thereabouts for legal and other expenses in connection therewith.

751 The other promissory note being for \$12,500, is held by me as security for the payment of said Mammoth Copper Company of the sum of \$12,500 provided to be paid to said Francis and Volkert when said mines are sold in accordance with the agreement of May 16, 1900, and as security for the faithful performance on the part of said company of their agreement to me of date June 8th 1900.

I herewith submit for your inspection the originals of said agreements, notes, mortgages and deeds.

2.

Certain of the mining claims mentioned in the agreement of May 16, 1900, were claimed under different locations by the other claimants, and by the terms of that agreement I was obligated either to acquire such adverse locations and claims by purchase, or to litigate the same.

In order to fulfill the obligations imposed upon me in this regard, it became necessary for me to go to England to see some of the adverse claimants. This I did in the summer of 1900. After 752 considerable negotiations I obtained the deed on the English claimants, Frederick Clark Beckwith, and the Tucson Mining and Smelting Company, Limited, a British corporation, and also of Herbert B. Tenny of Tucson, which deed was dated August 21st, 1900, and conveyed to me the following mining claims situate in said Silver Bell Mining district, to-wit: Page, Southern Beauty, Silver Bell, Confidence, Union, Emerald, Comet, Prospector, Florence, Imperial and Yankee.

The amount of costs and expenses by me in the negotiation and in acquiring said deed was as follows:

Purchase price, \$5,815.63.

The expense of trip, attorneys' fees and incidentals, \$2,668.51, all of which sums were expended by me on or about August 21st, 1900.

I now hold in my own name all the mining claims so conveyed to me by such deed.

3.

On June 29th, 1900, I obtained from Carl Nielsen, Mary Nielson, his wife, and L. B. Lewis, their deed conveying to me the
53 Clarence mining claim, situate in said Silver Bell mining district, and also, "all their right, title and interest in and to all mining claims, mill sites and property situate in said Silver Bell mining district, the legal or equitable or record title to which is now in either the Nielsen Mining and Smelting Company, a corporation, or in the Mammoth Copper Company, a corporation, or in the Tucson Mining and Smelting Company, a corporation, or in Frederick Clark Beckwith, or in Julius Volkert or John Francis, or in the heirs, distributees or estate of said John Francis, deceased, or in J. N. Curtis, or in Herbert B. Tenny, or in said Albert Steinfeld." This deed is of record in the office of the county recorder of Pima County, in Book 22. of Deeds to Mines, on pages 508 and 509, reference to which is hereby made.

For this deed I paid to the grantors on the 3rd day of July, 1900, the sum of \$2,000 and I now hold in my own name, all the mining claims so conveyed to me.

In this connection, I will further state that on June 29th, 1900, the Nielsen Mining and Smelting Company, by J. N. Curtis,
54 its president, and myself, as parties of the first part, and Mary Nielsen and Carl Nielsen as parties of the second part, entered into an agreement, the original of which is in possession of yourselves. At the time of the execution of this agreement I personally paid to said Nielsens out of my own money, the sum of \$2,000, which was in payment of the quit-claim deed executed to me by them and Lewis, above referred to; and it was at the same time agreed by Mr. J. N. Curtis, your president and myself, that the three hundred shares of stock assigned to me by the Nielsens should be held by me in trust until the purchase price thereof, to-wit: Ten thousand dollars was paid by the Nielsen Mining & Smelting Company, as per the agreement, when said shares should be assigned by me to your company.

4.

I am of the opinion that all of the mining claims and mill sites and property acquired, as above set forth, by the Mammoth Mining Company and by myself, are of great value to you, and that your company should own the same, and as an inducement to you
55 to purchase and acquire the same, I am willing to place you in your shoes, that is to say, to sell and convey to you all the interest so acquired by me, upon my being repaid the amounts of money I have expended, with interest, and upon your assuming and guaranteeing with security satisfactory to me the performance on your part, of all the matters and things and payments which under the various contracts I am liable or responsible for. To this and I herewith submit to you the following proposition:

5.

Proposition.

If you will repay to me, on or before the 15th day of October, 1901, the sums of money I have expended and expenses incurred, as above set forth, with interest thereon from the dates of such respective expenditures up to the 15th day of October, 1901, at the rate of 1 per cent per month, and aggregating the total sum of fifteen thousand, one hundred and ninety-two dollars and forty-five cents, being the aggregate of the following items, to-wit:

June 8th, 1900, paid Francis and Volkert and expenses, \$2,780.00.

756 Interest on above, \$451.75; total, \$3,231.75.

August 21, 1900, paid for deed Beckwith, Tucson Mining and Smelting Company, Limited, and Tenney, and expenses, trip to Europe to obtain same, and other expenses connected therewith, \$8,484.14.

Interest on same to October 15th, \$1,166.56.

June 29, 1900, paid to the Nielsens and Lewis for their deed, and expenses connected therewith, \$2,000.

Interest on same to October 15th, \$310; total, \$15,192.45 and if you will on or before the said 15th day of October, 1901, and at the same time that the said repayment is made to me, duly agree in writing to do and perform the annual assessment work required to be done on all mining claims, and pay or repay for the annual assessment work required to be done thereon for the years 1900 and 1901, and further agree to assume and perform all the matters and things agreed to be done by me, or assumed by me in my said agreement

with said Margaret Francis and Julius Volkert of date May 16, 1900, and further save and keep me harmless from any loss or expense by reason of my having entered into said agreement:

Then I will agree as follows:

First. Immediately to cancel as paid said note for \$2,780, executed to me by said Mammoth Copper Company, and thus extinguish said obligation.

Second. To hold all of said 997 shares of the capital stock of said Mammoth Copper Company, and to hold the \$12,500 promissory note and mortgage executed by said company, and to hold all the mining claims and mill sites conveyed to me by said Frederick Clark Beckwith, Tucson Mining and Smelting Company, Limited, and Herbert B. Tenney, by their deeds dated August 21, 1900; and the mining claims and the mill sites conveyed to me by said Carl Nielsen, Mary Nielsen, his wife, and L. B. Lewis; and to hold the 300 shares of the capital stock of the Nielsen Mining & Smelting Company (now the Silver Bell Copper Company) as trustee for your company, subject to the following trusts and conditions, to-wit:

1. That upon your complying and performing the matters and things by you agreed to be done and performed according to the terms of the written agreement which hereinabove is provided you shall execute to me, that is to say, upon your doing all

the matters and things by me agreed to be done and performed under my agreement with said Francis and Volkert of date May 16th, 1900, and upon your paying to them or their assigns the sum of \$12,500 in said agreement is provided, or procuring their release from said payment; and also paying to said Carl Nielsen and Mary Nielsen, or her or their assigns, or personal representatives, the sum of ten thousand dollars as agreed to be done by our joint agreement with them of date June 29th, 1900; then and in such event I will transfer and assign to you absolutely all of said shares of stock, both said 997 shares of stock of the Mammoth Copper Company and the 300 shares of the Nielsen Mining and Smelting Company; and I will cancel their promissory note for \$12,500 and satisfy on record the said mortgage given as security therefor; and I will convey to you absolutely all the right, title and interest acquired by me under the said deed executed to me by said Beckwith, Tucson Mining and Smelting Company, Limited, and Tenney and under the deed executed to me by Mary Nielsen, Carl Nielsen and L. B. Lewis.

2. That in the event you fail to carry out your said agreement with me to do and pay for the annual assessment work upon said mining claims, or to make either said payment of \$12,500 or said payment of \$10,000, respectively, as above provided or to do any of the other matters or things by you agreed to be done and performed under the terms of the written agreement which you are to execute me, as aforesaid, then and in such event you are to forfeit to me the moneys which you are to pay me, as aforesaid, and I am to be freed from said trust, and am to hold all of said shares of stock, promissory note, mortgage, mining claims, and mill sites described in said deed to me, absolutely in my own right, and free from any trust whatsoever, and you are to have no interest of any nature whatever, equitable or otherwise, thereto or therein.

I hereby give you until the 15th day of October, 1901, to accept this proposition and to pay me the said sum of \$15,192.45 to me, and to execute the written agreement above provided for; it being distinctly understood that if you fail to pay me said sum of \$15,192.45 and execute said agreement to me on or before said 15th day of October, 1901, then this proposition and action to you is ended and in that event I shall hold all said shares of stock in the Mammoth Copper Company, and all said mining claims aforesaid, individually and for my own benefit. The 300 shares of stock in the Nielsen Mining and Smelting Company (now the Silver Bell Copper Company), however, I will in any event continue to hold under our joint agreement with the Nielsens in regard thereto, unless you wish to disaffirm the said agreement as made by our president in regard thereto.

Yours truly,

ALBERT STEINFELD."

That attached and made a part of said document were the following contracts, viz: The contract known as the Nielsen agreement and described in the evidence herein and set out in full being Exhibit No. 44. And the contract contained in the

evidence herein and known as the Francis and Volkert agreement, attached to and being the latter part of Exhibit No. 137.

That said document had been prepared by S. M. Franklin, the attorney for said Silver Bell Copper Company, for the purpose of bringing the question of said Steinfeld's actions in purchasing said mines and properties before the stockholders of said company; but in making and in presenting the said proposition the said Steinfeld was not influenced by the advice given him by said Franklin concerning his relations and duties to the said company.

That said document was presented to the Board of Directors of said company on the 15th day of July, 1901, at which the said proposition was ordered filed; and at which meeting it was resolved that a meeting of the stockholders should be called to decide whether said proposition should be accepted or rejected. That no such meeting, as above found, was called or held.

That on October 1, 1901, a meeting of the directors of said
762 company, namely, Steinfeld, Shelton and Curtis, was held, at which the following took place:

"Mr. Albert Steinfeld stated he would agree, in consideration of this company performing any paying for the assessment work done and to be done, for the years 1900, 1901, and 1902, upon all of the mining claims mentioned and described in his communication to this company of date July 15th, 1901, to extend the time within which this company has the right to accept his said proposition and to pay the amounts of money required by it to be paid if the proposition is accepted, from October 15th, 1901, the date mentioned in said communication, until the 15th day of September, 1902; provided, however, that upon said 15th day of September, 1902, this company not only pay to him the amount of money called for in said communication, to-wit: \$15,192.45, but also to pay him the interest from October 15th, 1901, until the 15th day of September, 1902, at the same rate as is set forth in said communication.

On motion duly seconded it was unanimously resolved
763 that the foregoing proposition of Mr. Steinfeld be accepted and that the president of this company be and he is hereby authorized to do, perform and pay for the annual assessment work for the years 1900, 1901, and 1902, upon the mining claims mentioned in the communication of Mr. Albert Steinfeld of date July 15th, 1901, and further

Resolved, That the meeting of stockholders authorized and directed by the resolution of this board heretofore adopted, to be called by the president for the purpose of considering the proposition of Mr. Steinfeld on date of July 15th, 1901, be called by him on a day not later than the 15th day of September, 1902."

That a stockholders' meeting was thereafter held on said October 1st, 1901. L. Zeckendorf was not then in Tucson. No action whatever with reference to said proposition was taken and no such meeting as that so ordered to be called was ever called or held. That the matter of the acceptance or rejection of said offer did not again come before either the directors or stockholders of said company and no

764 corporate action was taken thereon until the meeting of the directors held under date of May 20th, 1903, hereinafter found and set out. That at all times after July 15, 1901, the Silver Bell Copper Company continued, as it had since November, 1900, to possess, work and use, and do the assessment work on all said properties as its own and as one property and with the full knowledge and consent of Albert Steinfeld and the Mammoth Copper Company.

XVIII.

That neither said Albert Steinfeld nor said Mammoth Copper Company at any time after July 15, 1901, made or asserted any claim to or right in any of said mines or property, except such as are recited in the minutes of the meetings of the directors of the Silver Bell Copper Company.

That plaintiff knew nothing of said proposal or of the facts concerning the purchase of said mines, properties or stock, and of the prices paid therefor, or of the circumstances surrounding the same until long after May 20th, 1903, except that plaintiff knew that said

765 Steinfeld had, during the year 1899, and the early part of the year 1900 reported to plaintiff that the purchase of the same was desirable and should be accomplished and that said Steinfeld intended for the company to acquire the same, and further that when said Steinfeld returned from Europe after concluding the purchase of the English titles to said English group of mines, he advised and told plaintiff that he had purchased the same.

XIX.

That in the month of March, 1901, said Albert Steinfeld called upon said J. N. Curtis to prepare a written report of "the mines and mining properties of the Silver Bell Copper Company," and that on the 24th day of March, 1901, pursuant to said request, said J. N. Curtis, as the president of said Silver Bell Copper Company, delivered to said Albert Steinfeld a written report and statement, particularly describing the properties of the Silver Bell Copper Company, in which written report he, the said J. N. Curtis, included by description as the property of the Silver Bell Copper Company, all of the said English group of mines and other mines mentioned in Finding XXII,

766 but without in any manner segregating or grouping the same; that said Albert Steinfeld, in said month of March and in the month of April, 1901, circulated said written report and delivered copies thereof to various and different people and, over his signature, to this plaintiff as being a correct report of the mines and mining properties belonging to said Silver Bell Copper Company; and that thereafter and at various and different times said Albert Steinfeld furnished to this plaintiff written reports over his signature of the properties belonging to said Silver Bell Copper Company.

That Albert Steinfeld did not at any time prior to the purchase from the English owners of their title to the English group of mines make any direct or express promise or representation to the

Nielsen Mining and Smelting Company or the Silver Bell Copper Company or to any officer or director of said company, that he would purchase as agent or representative of said company or otherwise, the Francis and Volkert titles to the English group of mines or the title of the English owners to the English group of mines for the use or benefit of the said company.

767

XX.

On April 3, 1903, said Albert Steinfeld wrote a certain letter to one G. A. Beaton, giving him an option upon and, whereby he agreed that he would convey or cause to be conveyed for the sum of \$515,000 all of the said properties as one entire property, including therein all mines and properties standing in the name of J. N. Curtis, Albert Steinfeld and of said Mammoth Copper Company in said Silver Bell mining district, which, in addition to the mines standing in the name of said Silver Bell Copper Company would include the mines standing in the name of said J. N. Curtis, and the said English group of mines standing in the name of said Albert Steinfeld and said Mammoth Copper Company and said two mines so purchased from said Nielsen & Lewis standing in the name of said Albert Steinfeld. That at the time said price of \$515,000 was fixed for said entire properties, said Steinfeld intended to renew and permit the corporation to accept the terms of the proposition dated July 15, 1901, as extended on October 1st, 1901, and the

768 officers of said Silver Bell Copper Company expected the corporation to avail itself of said offer so that the whole of said price would be paid to and become the property of said Silver Bell Copper Company. That on the 13th day of May, 1903, said Albert Steinfeld formally reported to the board of directors of said Silver Bell Copper Company in session, that he had made or given on behalf of himself and the Mammoth Copper Company and of the Silver Bell Copper Company a written option to George A. Beaton of New York City and his assigns, for the sale amongst other things of all the property rights, interests and assets of the said Silver Bell corporation; and requested that his action in so doing be confirmed, and thereupon and upon such request, he voting therefor his action in giving said option for said purchase price was confirmed. That the option to said Beaton was taken by him for the Imperial Copper Company and the sale thereafter consummated to the Imperial Copper Co. to all of the properties described in Finding XXII was, under and by virtue of said option and for the purchase price of \$515,000 named therein.

769

XXI.

That negotiations for and concerning said sale were continuous from the time of the giving of said option to said Beaton down to and including the 20th day of May, 1903. That said Albert Steinfeld personally conducted said negotiations, by and on behalf of said Silver Bell Copper Company, with said Imperial Copper Com-

pany and said Beaton and the attorneys of said Imperial Copper Company, and caused S. M. Franklin, his personal attorney and the attorney for said Silver Bell Copper Company to take part in said negotiations and to assist in the preparation of all contracts and papers, and to do other work in connection with said sale, said S. M. Franklin during all said negotiations acting as the attorney for said Silver Bell Copper Company, on the direction of said Steinfeld.

XXII.

That said sale was consummated on May 20, 1903, and the mines and mining properties sold to the Imperial Copper Company on the 20th day of May, 1903, were the following:

770 Mammoth or Old Boot, Copper, Herbert, Confidence, Accident, Black Daisy, Black Eagle, Imperial, Pima, John F. Murray, Apache, Belle, Emerald, Papago, Pope, Prospector, Omaha, Leslie, Hamilton, Baltimore, Maggie, Silver Bell, Swansea, Spike, Florence, Detroit, Billy, Southern Beauty, Sampson, Frank B., Union, Hilda, Wedge, Comet, Millionaire, Alliance, Page, Trudie, Northern, Yankee, Olympic, Strip, Mollie, El Paso, Fraction, Anita, Queen and Enterprise;

That of said mines, the following named mines were those which were known as the English group of mines, namely:

Herbert, Confidence, Black Daisy, Black Eagle, Imperial, Pima, John F., Murray, Apache, Belle, Emerald, Papago, Pope, Prospector, Omaha, Leslie, Hamilton, Baltimore, Maggie, Silver Bell, Swansea, Spike, Florence, Detroit, Billy, Southern Beauty, Sampson, Frank B., Union, Hilda, Wedge, Comet, Millionaire, Alliance, Page, Trudie, Northern, Yankee, Olympia, Strip, Mollie, El Paso, Fraction, Anita, Queen, Enterprise.

XXIII.

That pending said negotiations the representatives of the
771 Imperial Copper Company demanded as a condition to the carrying out of said sale that Albert Steinfeld and the Silver Bell Copper Company should guarantee the titles to said properties and that said Steinfeld did, in pursuance of said demand and insistence of said representatives of the Imperial Copper Company, sign and cause the said Silver Bell Copper Company to sign a document, being Defendants' "Exhibit K K."

XXIV.

That under date of 20th day of May, 1903, all of the properties listed and described in the schedule "Exhibit A" attached to plaintiff's complaint and amended complaint on file herein, were sold to the Imperial Copper Company for the purchase price of \$515,000.00. That the Silver Bell Copper Company, Albert Steinfeld and the Mammoth Copper Company joined in the deed of conveyance of said properties: That said purchase price of \$515,000.00 under the terms of the sale thereof, became payable as follows, to-

wit: \$115,000.00 in cash on said 20th day of May, 1903, and \$400,-
000 in four equal payments of \$100,000 each, due respectively in
three, six, nine and twelve months after said 20th day of
772 May, 1903, each of said payments being represented by a
promissory note executed by the Imperial Copper Company
for \$100,000.00 principal, to the order of, and payable to the said
Silver Bell Copper Company, each of said notes being dated the
said 20th day of May, 1903, and bearing interest from said date of
payment thereof, at the rate of six (6) per cent. per annum; that
the sum of \$115,000.00 in cash was paid by said Imperial Copper
Company to and received by said Albert Steinfeld, as the treasurer
of the said Silver Bell Copper Company; that the said four promis-
sory notes, each for \$100,000.00 principal, as aforesaid, were de-
livered to and received by the said Albert Steinfeld, as treasurer of
the said Silver Bell Copper Company, and said cash and notes were
to be held by said Steinfeld pursuant to the agreement of May 20,
1903, in the next finding set forth.

XXV.

That on the said 20th day of May, 1903, after the said sale was
completed, the said Silver Bell Copper Company, Albert Steinfeld
and the Mammoth Copper Company, executed an agree-
773 ment in writing, in the words and figures following, to-wit:

"This agreement made this 20th day of May, 1903, be-
tween the Silver Bell Copper Company, a corporation organized and
existing under the laws of the Territory of Arizona, party of the
first part, and the Mammoth Copper Company, a corporation or-
ganized and existing under the laws of the Territory of Arizona,
party of the second part, and Albert Steinfeld, of Tucson, party of
the third part, witnesseth:

"Whereas, the parties hereto have this day agreed to sell certain
mining claims and property to the Imperial Copper Company, a
corporation, as per written agreements heretofore made, and deeds
for which property are now in escrow with the Phoenix National
Bank, of Phoenix, Ariz., and

"Whereas, the parties hereto desire to settle and determine as
between themselves, what disposition shall be made of the proceeds
of said sale; and

774 "Whereas, the said Albert Steinfeld has assumed certain
obligations with the said Imperial Copper Company, as more
fully appears in the various agreements heretofore entered
into by him in making such sale, and particularly in a certain
Guarantee Agreement, wherein, amongst other things, said Stein-
feld guarantees the title to certain mining claims so sold or agreed
to be sold, and the parties of the first and second part desire to in-
demnify him against loss by reason of any of the said matters or
things so done by him.

"Now, therefore, in consideration of the premises, and of the sum
of one dollar (\$1.00) by each of the parties hereto to the other in
hand paid, receipt whereof is hereby acknowledged, it is hereby

mutually agreed that the purchase price paid and to be paid upon the sale, shall belong to and be the property of the said Silver Bell Copper Company.

"And it is further agreed that the four promissory notes of one hundred thousand dollars (\$100,000.00) each, this day executed by the Imperial Copper Company, to the Silver Bell Copper Company, upon said sale, as well as the proceeds of said promissory notes when collected, shall be held by the said Albert Steinfeld, as trustee, 775 and as security for, and indemnity against loss, damage or expense which may arise to him for or out of, or by reason of any and all obligations and liabilities which he has assumed with the said Imperial Copper Company, or any other person whatsoever.

"And it is further agreed that no dividend shall be declared by the said Silver Bell Copper Company until the stockholders of said Company shall first have fully indemnified said Albert Steinfeld against loss, which might arise to him in the future, from or on account of any such obligations or liabilities so assumed by him.

"In witness whereof, the said corporations, parties of the first and second part, has caused these presents to be signed by its President and Secretary, and its corporate seal to be hereunto affixed by resolution of its board of directors, and the said Albert Steinfeld has hereunto placed his hand and seal the day and year first above written. In triplicate."

That the terms of this agreement, and that it should be executed, were, however, all orally agreed upon before the said sale was completed, or said money was paid, or said notes executed by 776 the said Imperial Copper Company.

XXVI.

That after the said 20th day of May, 1903, and prior to the first day of January, 1904, said Imperial Copper Company, paid two of said promissory notes, paying the principal thereof, with the interest at said rate of six per cent per annum on said principal up to the respective dates of payment, making a total of the cash paid to the said Silver Bell Copper Company, by said Imperial Copper Company, prior to January 1st, 1904, for and on account of said purchase and sale of said properties so listed and scheduled in said "Exhibit A" or the sum of \$319,487.50; that the said sums of money aggregating the said sum of \$319,487.50, were received by the said Silver Bell Copper Company from the Imperial Copper Company, as and for the first cash payment, and as the payments of the two promissory notes first falling due on the purchase price of said sale so made to said Imperial Copper Company. That of said sum there was regularly paid out for and on account of certain debts and contracts 777 of the Silver Bell Copper Company, a total of \$118,000.00, including the sum of \$18,117.00 paid to Albert Steinfeld May 21st, 1903.

XXVII.

That after the conclusion of said sale to said Imperial Copper Company, and after all papers had been delivered in connection with

the said sale and the negotiations in connection therewith, and on May 20, 1903, the board of directors of said Silver Bell Copper Company convened; the following are the records of the minutes of said meeting, viz:

"A meeting of the directors of the Silver Bell Copper Company was held at the office of the company in Tucson, Arizona, on May 20, 1903, at 4 o'clock p. m., pursuant to call of the President.

Present: J. N. Curtis, President; Albert Steinfeld, Director, R. K. Shelton, Director.

The President reported that the negotiations for the sale of the properties of this corporation had been concluded. That the Imperial Copper Company, as the nominee of George A. Beaton, had agreed to purchase all the mining claims of this company in 778 the Silver Bell Mining District, Pima County, Arizona, and all the machinery, plant and personal property used therewith; also all of the mining claims and personal property used therewith, of the Mammoth Copper Company, as well as certain other mines or interests therein which stand in the name of Albert Steinfeld, and in the individual name of the President, and to pay therefor the sum of \$515,000, as follows: the sum of \$115,000 in cash, which sum it did pay, and is now in the hands of Albert Steinfeld, Treasurer; and the balance, \$400,000 in four equal installments of \$100,000, each, payable in three, six and nine and twelve months from this date, with interest thereon until paid at 6 per cent per annum; and for which deferred payments said company executed to this company its four promissory notes, which now are also in the hands of the Treasurer.

He further reported that the necessary deeds and agreement had been executed by the President and Secretary of this Company and amongst others a Guarantee Agreement which Guarantee Agreement was also signed and executed by the Mammoth Copper Company and by said Albert Steinfeld, individually. The said agree- 779 ments were read and considered.

He further reported that the deeds so executed had been placed in escrow with the Phoenix National Bank of Phoenix, subject to certain escrow instructions, a copy of which escrow instructions were produced and read.

He further reported that Mr. Albert Steinfeld, who had conducted the negotiations with the Imperial Copper Company had again submitted for acceptance, the proposition which he had heretofore submitted in writing on July 15th, 1901, with the modifications, however, that this company shall pay to him forthwith in cash, the sums of money which in said proposition were required to be paid on October 15th, 1901, to-wit: the sum of \$15,192.45, and also shall forthwith pay in cash, interest thereon from October 15, 1901, to this date at the rate of 1 per cent per month amounting to \$2,924.55, making a total of \$18,117.00 and that this company shall also assume and pay all obligations, which he said Steinfeld, has incurred in conducting the negotiations and in making the sale of said mining claims and property to the Imperial Copper Company, and 780 keep him free and harmless from any and all expense and loss, which may arise to him by reason of any claim or as-

erted claim, of any person whatsoever, for or on account of, or arising out of or connected with the present sale, and negotiations, or any past negotiations or transactions, in regard to said mining claims or any of them. And particularly that this company shall assume and pay unto N. O. Murphy, the commissions which he, said Steinfeld agreed to pay to said Murphy, to-wit: the sum of \$25,000, said agreement being made for and on behalf of this company; and also shall keep him harmless from loss, damage or expense, by reason of the asserted claim of one, J. M. Burnett, for commissions.

Also that this company shall indemnify him against loss, damage or expense, by reason of his having guaranteed the titles to the mining claims sold, or agreed to be sold, to said Imperial Copper Company, as is set forth in the Guarantee Agreement heretofore submitted to this meeting.

The President also stated that it was necessary to adjust with the Mammoth Copper Company, the disposition that was to be made of the purchase money upon the sale; He then submitted the agreement between this company, the said Mammoth Copper Company and Albert Steinfeld on this point and also covering the matter of guarantee:

After a full consideration the following resolutions were unanimously adopted, to-wit:

Resolved, That all the acts of the President and Secretary of this corporation, and all papers, agreements and deeds signed by them, or on behalf of this corporation in the matter of the negotiation and sale of this Company's property to the Imperial Copper Company, be, and the same hereby are ratified, approved and confirmed.

Resolved, That the proposition of Albert Steinfeld as herewith submitted be, and the same hereby is accepted, and that he (said Steinfeld) be forthwith paid by this corporation the sum of eighteen thousand one hundred and seventeen (18,117) dollars, and that out of the first moneys received by this Company upon the promissory notes of the Imperial Copper Company, he, said Steinfeld, as Treasurer of this Company, shall retain sufficient moneys to pay the amounts necessary to be paid to Margaret Francis and Julius H. Volkert under the agreement with them aforesaid; and to pay to the assigns or legal representatives of Carl S. Nielsen (he being now deceased) and to Mary Nielsen, the amount necessary to be paid under the agreement with said Nielsens aforesaid; and when said amounts respectively became due, to pay the same to the parties entitled thereto.

Resolved, That Albert Steinfeld as Treasurer of this Company be, and he is, hereby authorized to pay to N. O. Murphy whatever commissions may be coming to him.

Resolved, That the President and Secretary of this corporation be, and they hereby are, authorized, empowered and directed, in such manner and form, as they deem necessary or proper, to indemnify said Steinfeld, against all loss, damage and expense that may arise to him by reason of his having guaranteed the title to the properties so sold, or agreed to be sold to the said Imperial Copper Com-

pany; and that he, and they hereby are, authorized, empowered and directed to do or cause to be done all things and to execute all papers, documents or other writings, which they deem necessary in the premises.

Resolved, That the agreement this day made by the President and Secretary of this corporation with the Mammoth Copper Company and Albert Steinfeld, in regard to the disposition of the proceeds of the sale this day made to the Imperial Copper Company, and indemnifying said Steinfeld be, and the same is, hereby ratified, approved and confirmed.

The minutes of this meeting were then read and after first being amended by striking out lines 1 to 16, both inclusive, on page 46 of this book, and striking out part of line 21 and all of lines 22 and 23, on the same page, the same were on motion approved as amended.

On motion the meeting adjourned, subject to the call of the President.

J. N. CURTIS, *President.*

ALBERT STEINFELD, *Director.*

R. K. SHELTON, *Secretary."*

XXVIII.

That in the months of October and November, 1903, said Albert Steinfeld sent all said money and notes, except \$50,000.00 which had theretofore been attached in a suit by S. M. Franklin, to the California Bank in San Francisco, and deposited the same in said Bank in his individual name. Plaintiff brought an action in the city and county of San Francisco, state of California, against said Albert Steinfeld and said Bank. Defendants' Exhibit "J" is a copy of the complaint in said action. Plaintiff obtained an injunction therein restraining Steinfeld from receiving and said Bank from delivering to him said money or notes.

XXIX.

That after the 21st day of May, 1903, and some time in the month of May or June, 1903, S. M. Franklin, claiming to be a creditor of the said Silver Bell Copper Company, brought an action against the said Silver Bell Copper Company for the sum of \$51,500, and in said action garnished the sum of \$51,500, as the property of the Silver Bell Copper Company, then in the hands of said Albert Steinfeld. The said action is entitled "S. M. Franklin, Plaintiff, vs. Silver Bell Copper Company, defendant," and was brought in this court. That after said garnishment was levied on said Albert Steinfeld, and some time in the month of January, 1904, said Albert Steinfeld paid back to the Silver Bell Copper Company \$25,750 of said \$51,500, in his hands retaining the other \$25,750 as security against the said garnishment under an agreement with the said Silver Bell Copper Company that he would hold and retain \$25,750 in his hands as

such security against said garnishment, and that after paying to said S. M. Franklin any moneys that might be recovered, or for which he might get judgment in said action, he would pay to the Silver Bell Copper Company the balance of \$25,750 so left in his hands as security after deducting the money so paid to him said M. Franklin.

The said Albert Steinfeld thereafter continued to hold and at the time of commencement of this action still held said sum of \$25,750 as such security, the same being the property of the said Silver Bell Copper Company.

XXX.

That as hereinabove found, said Albert Steinfeld, as treasurer and trustee of the Silver Bell Copper Company, on May 20th, 1903, received from said Imperial Copper Company the sum of \$115,000 in cash; That on August 23rd, 1903 one of said four promissory notes was paid, and said Steinfeld, as treasurer and trustee, as aforesaid, received in payment of the same the sum of \$101,500.00; That on November 23rd, 1903, another of said notes was paid and said Steinfeld, as such treasurer and trustee, received in payment of the same, the sum of \$102,987.50, making a total of \$319,487.50 that said Steinfeld as such treasurer and trustee had received by November 23, 1903, from said Imperial Copper Company on account of such purchase price.

That said money was disbursed by said Steinfeld as shown by his account presented and filed on December 26th, 1903, as hereinbefore found.

XXXI.

That after the controversy arose in the city and county of San Francisco by and between the said plaintiff and the said Albert Steinfeld, resulting in the bringing of the action above referred to, on the 26th day of December, 1903, a meeting of the stockholders of said Silver Bell Copper Company was held at the city of Tucson, County of Pima, Territory of Arizona, at which were present Albert Steinfeld, R. K. Shelton, J. N. Curtis and L. Zeckendorf, Eugene S. Ives, attorneys for and representing Albert Steinfeld, and William H. Barnes, representing and attorney for L. Zeckendorf.

XXXII.

That at said meeting of December 26th, 1903, the following proceedings and discussions took place, to-wit:

Meeting of the Stockholders of the Silver Bell Copper Company, Held at the Office of Smith & Ives, Tucson, Arizona, December 26th, 1903, 4:00 p. m.

By Mr. IVES: If you will pardon me for making an opening statement—

We are here to see what we can do. You made us a proposition

which was the same as the proposition which was submitted by Mr. Lilleanthal in San Francisco.

Now, we are unwilling, at this stage of the game, to do anything.

When I say "we," I mean Mr. Steinfeld, but we want
788 to do things if we can agree. As I gathered, one of the chief contentions of Mr. Zeckendorf's was that Mr. Steinfeld had the personal custody of the proceeds of these notes, and of the notes, and he objected to it.

Now, since then, he has brought two suits, one attachment or open suit for money in which an attachment has been issued, and the other, a stockholders' suit in which he has obtained an injunction.

Now, we want those suits disposed of. I am talking frankly in that matter—and until disposed of, Mr. Steinfeld is unwilling to agree to anything. He feels his business integrity has been impugned; and he wants them disposed of. Now, we want to meet you as far as we can. We will never be willing to admit that Mr. Steinfeld had the possession of these moneys wrongfully. We maintain now, as we maintained then; that he had them by virtue of the agreement which was executed in pursuance of a resolution of the Board of Directors, which he claims, and we believe was, a valid resolution, and a valid agreement. (I am not arguing that
789 point with you.) He claims that. Now, you have attacked that agreement and the resolution. The prayer of your complaint asks that a receiver be appointed to hold the moneys and the notes in the Bank of California for the benefit of the Silver Bell Copper Company; that an injunction issue restraining Steinfeld from receiving, and the Bank of California from delivering to him said money and notes; that Steinfeld be required to set forth—

(3) That Steinfeld be required to set forth the nature of his claim to said money and notes and the terms of the agreement; and to account to the Silver Bell Copper Company for moneys received.

(4) That the resolution and agreement therein referred to be declared null and void.

(5) That the plaintiff have such other and further relief as may be just in the premises.

The first paragraph, that a receiver be appointed, I will pass.

The second subdivision is your prayer that an injunction issue;—that has been issued.

And third, that Mr. Steinfeld be required to set forth the
790 nature of his claim; he has done; he has given you a copy of the resolution which you already had; and he has given you a copy of the agreement which you did not have before, although we stated it as best we could verbally to Mr. Zeckendorf and Mr. Lilleanthal in San Francisco.

The fifth, asking for any other or further relief necessarily, I pass.

The fourth paragraph, that the resolution and the agreement herein referred to be declared null and void, we are willing to accede to.

I omitted to state that the third subdivision of your prayer asks, not only that he disclose the nature of his claim, but that he account for the moneys. That account he has rendered, and will be pre-

pared to submit it at this meeting. He has resigned his office of treasurer of the Company, and he has turned over to Mr. Curtis all of the money which by such account appears to have been collected by him and not expended, except \$51,500.00 which has been garnished in his hands in the Franklin suit, and he has given to the Company a bond with two good sureties in that sum of money, that he will turn over that money to the Silver Bell Copper Company whenever the suit is dismissed, or will turn over the balance, if any judgment should be collected, after paying what amount of money has been adjudged by judgment or otherwise to be due Mr. Franklin.

So we have set forth the nature of our claim. We have made the account; we have turned over the money. We are unwilling to admit that we did not have the right to this money. We still assert that this resolution and agreement was honest and valid, and that Mr. Steinfeld, under it, had the right to this money, and had the right to act as he has done. But since you attack it, we are willing to agree to pass a resolution in the language of your prayer in which we will rescind the resolution and agreement, and relinquish all right whatever to the personal custody of that money, and turn it over to the company.

Now, I drew a little resolution, which I would suggest one of you gentlemen (I am not a member of the Board) should offer. But first I suggest an organization."

Mr. Shelton reads proposed resolution: "Resolved that the agreement executed on May 20th by the President and Secretary of the corporation, the Mammoth Copper Company and Albert Steinfeld, be and the same is hereby rescinded and that the said agreement and resolution passed on said day be declared null and void."

Judge BARNES: We cannot settle the prayer of the complaint here.

Mr. IVES: We are acquiescing in your demand, that is what I mean.

Judge BARNES: Have you got a copy of that contract to attach to that resolution?

Mr. IVES: Yes, I am perfectly willing to do that.

Judge BARNES: And let that go on the minutes?

Mr. IVES: Certainly.

Mr. IVES: I intended this to be a Stockholders' meeting. We will now organize as a Stockholders' meeting.

Our desire is in good faith to rescind that resolution, but we will never admit we acted wrongfully in taking the money; you attacked the resolution, and we are willing, if you wish, to rescind it.

Stockholders' Meeting.

Present:

J. N. Curtis, President.
R. K. Shelton, Secretary.

Stock Represented:

Mr. L. Zeckendorf.....	250 shares
Mr. Steinfeld.....	249 shares
Mr. Albert Steinfeld, Trustee.....	330 shares
Mr. R. K. Shelton.....	1 share
Mr. J. N. Curtis.....	170 shares
Total.....	1,000 shares

Judge BARNES: There is a question about that.

Mr. IVES: That is the way it appears on the books of the Company; that does not consider any question whatever as to the ownership of the stock; that is the way it appears on the books of the Company for voting purposes, only.

Judge BARNES: As I read the minutes—I have a copy of the minutes—that heretofore in the meetings of the stockholders, 529 shares of stock of this company have stood in the name of L. Zeckendorf & Company, and they have been voted as such at all stockholders' meetings until this. That is an asset of L. Zeckendorf & Co.; never been divided; an asset of the company; would be liable to its debts; the creditors could pursue it; it belongs to L. Zeckendorf & Co.; it does not belong to Mr. Zeckendorf or Mr. Steinfeld, except as they agree to separate it.

Mr. IVES: Has it ever been separated on the books of the company?

Mr. STEINFELD: Yes, sir.

Mr. IVES: As far as the stockholders' meeting is concerned, the books of the company control. There is no waiver with respect to any ownership of stock.

Judge BARNES: We have no objection to passing that resolution on behalf of Mr. Zeckendorf.

I don't care to discuss the questions you have gone over. I don't know as anything is to be gained by it. If the contract of May 20th is rescinded that is all we care for on that point.

Mr. CURTIS: We have not voted on this resolution.

795 Mr. IVES: Call the roll.

(Mr. Curtis called the roll and the following named stockholders voted "Yes" in favor of said resolution, the number of shares opposite their respective names):

Mr. L. Zeckendorf.....	250 shares.	Yes.
Mr. Albert Steinfeld.....	249 shares.	Yes.
Mr. Albert Steinfeld, Trustee.....	330 shares.	Yes.
Mr. R. K. Shelton.....	1 share.	Yes.
Mr. J. N. Curtis.....	170 shares.	Yes.

Mr. IVES: I will change this resolution: "Agreement executed on May 20th, by the President and Secretary of the corporation, with the Mammoth Copper Company with Albert Steinfeld, a copy of which is hereto annexed.

Judge BARNES: Yes, I will see if it is the contract, I think it is.

Mr. IVES: It is a copy of the contract I served you with.

Mr. IVES: I will add that Mr. Steinfeld, in addition to giving Mr. Curtis the money, has given Mr. Curtis an order upon the
796 Bank of California; I mean Mr. Curtis as officer of the corporation, of the Silver Bell Copper Company,—an order upon the Bank of California for the money they have, and the notes, so that Mr. Steinfeld no longer makes any claim whatever for the personal custody of either the money or the notes.

Judge BARNES: As a stockholder of this company, Mr. Zeckendorf protests against the funds of this company being deposited in any other than in the name of the company, by its treasurer, and he insists as a stockholder, that the treasurer be required to give a bond for the faithful performance of his duties. And he protests against the funds of the company being kept in the name of anybody either as treasurer personally, or in any other manner except in the name of the company, and to be drawn out by the treasurer on direction of the company. If Mr. Steinfeld resigns we will choose another treasurer.

Mr. IVES: The directors will have to choose the treasurer.

Judge BARNES: Mr. Zeckendorf does not object to Mr. Steinfeld being the treasurer of this corporation.

797 Mr. IVES: I will make a motion in the name of Mr. Steinfeld.

Mr. Steinfeld moves that the funds of the company shall be deposited in the name of the company by its treasurer, and shall not be kept in the name of anyone as trustee or personally, or in any manner except in the name of the company, by its treasurer, and shall be drawn out only by the treasurer at the direction of the company.

We have left out what you said about the bond, for the present anyhow.

Mr. Steinfeld makes that motion. Is that seconded by Mr. Zeckendorf?

Mr. ZECKENDORF: Yes.

The aforesaid resolution put to vote and all the stock voted in favor of the resolution and the same was declared passed.

Judge BARNES: Now with reference as to who shall be treasurer. That is a question for the Board of Directors, and I would suggest on behalf of Mr. Zeckendorf, when they do choose a treasurer that Mr. Zeckendorf has no objection to Mr. Steinfeld being treasurer;

798 but that whoever shall be treasurer they shall give a reasonable bond in proportion to the amount of money in his hands.

Mr. IVES: That is a very large amount of money.

Mr. ZECKENDORF: I think it should be for the amount involved.

Judge BARNES: Yes, for the amount in his hands.

Mr. IVES: That is a most unusual proceeding. We will consider it later.

Judge BARNES: Have you any further business you desire to bring before the meeting?

Mr. IVES: I don't know of any.

Judge BARNES: Now we want to say here at this meeting, Mr. Shelton appears as a Director of the Company. He is an employe of L. Zeckendorf & Co., is not the owner of any stock, and therefore he has no right to hold the office of director; he evades it by having one share of stock transferred to him; he don't own it; it is a mere evasion of that statute which says that a director must be a stockholder. It means a bona fide stockholder. We have no objection to Mr. Shelton personally, he is an employee down there; he is down there to serve L. Zeckendorf & Co., and we don't want to embarrass him by having him get into difficulties of this corporation; and we think that this directors' meeting ought to take some action in that particular, if they desire to do it. Mr. Zeckendorf is a minority stockholder, but he is a large stockholder, besides the assets belong to L. Zeckendorf & Co. He is one of the three men that own this property. This property is all owned by Mr. Steinfeld, Mr. Curtis and Mr. Zeckendorf. Mr. Zeckendorf is the only one not allowed to be a director; and we think that they ought to be directors who are bona fide stockholders.

Mr. IVES: We will consider that. For myself, personally, I see nothing unreasonable in that, but until these suits are disposed of we feel we have gone as far as we care to.

Judge BARNES: There is another matter we desire to bring before you. This company has practically sold its assets, and got nothing left but the proceeds of that sale; it has got cash and notes coming in. There are some obligations. There is an obligation on Mr. Steinfeld's part to guarantee these titles up to the 20th of May, when the last payments are due. Now, these guarantees are matters that Mr. Zeckendorf regards as of small moment; he would be willing to assume the obligations of all of them for fifteen or twenty thousand dollars. We do not think that with \$200,000 of money coming in between now and next April, many times more than enough to meet any obligation that can come up, including the suit of Mr. Franklin, or any other threatened suits, or to make good the guarantee of good title up to the 20th of May. That it is an injustice to the stockholders of this company to hold the funds back as against Mr. Franklin's suit; that suit cannot possibly be tried until long after the 20th of April. We think it an injustice to these stockholders to tie up these funds, when there is over \$200,000 coming in, more than ample to pay them. More than that, Mr. Zeckendorf is amply good to protect Mr. Steinfeld to the extent of his interest in this company. We feel that the moneys on hand ought to be divided up: First to the paying of Mrs. Francis, whatever it is; \$12,000 to the paying of Mrs. Neilsen; and that the balance of the money ought to be paid to the stockholders; they ought to have the use of the money, and leave it to the last payment to the protection of these obligations. They are not dangerous, to the extent of more than \$50,000 at the outside, and

there will be \$100,000 and six per cent interest due on the 20th of May. Mr. Franklin's suit cannot be tried until long after that.

So that, we think that the moneys on hand, the proceeds of the sale of this property, after deducting sufficient to pay Mrs. Neilsen and Mrs. Francis, that the balance of this money should be distributed, and that there ought to be a dividend made of these funds.

And I will make a still further suggestion. It has been stated here that they are very anxious to have this injunction dismissed. If this be done, and the money be reserved or paid to Mrs. Neilsen and Mrs. Francis and a dividend be made of the money on hands, leaving to the last payment the protection of Mr. Steinfeld's obligations, and also by leaving these notes in the hands of the Bank of California with directions to collect this money and deposit

802 it to the credit of the company. With that done, I am satisfied that Mr. Zeckendorf would be very willing to dismiss the injunction suit.

Mr. IVES: While in all human probability these notes will be paid, they have not been paid yet. If the Imperial Copper Company should turn out to be unable or unwilling to pay them the mine will come back.

Judge BARNES: And they are good for all these obligations.

Mr. IVES: The mines would come back. Now, whether it would be good policy for this company to distribute all of its funds without any money to work the mines, I concur that that is a question of judgment.

Judge BARNES: These three gentlemen are well able to do that and they can raise money.

Mr. IVES: It won't be long after the notes are paid. I won't say that there won't be any distribution, but I think that these suits should be dismissed without any condition whatever. We have complied with the prayer of your complaint.

Judge BARNES: I won't say whether they will or not. I am simply discussing it as a business policy; that these funds ought
803 to be distributed. The company is not engaged in any business; its mines are sold; if they should come back they would come back free from any obligations. There is no reason why my client, Mr. Zeckendorf, should not have the use of his money, no reason in the world; I think Mr. Curtis has about \$17,000 of his money in it; I don't see why he, Louis Zeckendorf, should not have his.

Mr. IVES: That is a question; it is a matter of policy; and there is a great deal to say in support of the view you take of it. That will be considered. Until the suits are disposed of—

Judge BARNES: Those things will have to be somewhat simultaneously, you cannot expect those things to be done unless they are done as current acts.

Mr. IVES: This is practically a demand by Mr. Zeckendorf who chances to be plaintiff in a suit which it appears to me to be totally without merit—

Judge BARNES: I have not said that; I said we would consider this

matter; I have not said what we would do; I simply suggested that it would be wise to consult together——

804 Mr. IVES: We feel that we should be met now and the injunction suit dismissed and the attachment suit.

Judge BARNES: We will consider that.

Mr. IVES: I will now show you this statement.

(Statement omitted in this copy.)

Mr. IVES: We are not asking you to audit it; we only want you to see what has been done.

Judge BARNES: Now this item of \$51,500 garnishee of Mr. Franklin; I don't think that money should be held back from these stockholders that is a contested lawsuit, and it will probably not be settled for two or three years.

Mr. IVES: Mr. Curtis, has Mr. Steinfeld turned over to you as officer of this company the sum of sixty thousand dollars in money?

Mr. CURTIS: Yes, sir.

Q. You have that money?

A. Yes, sir.

Q. And will now deposit it to the credit of the Silver Bell Copper Company in pursuance of this resolution?

A. Yes, sir.

Q. You have an order upon the Bank of California for the \$49,987.50?

805 A. Yes, sir.

Q. You have it as officer of this company?

A. Yes, sir.

Q. Signed by Steinfeld, instructing the bank to deliver it to you?

A. Yes, sir; as officer of this company.

Q. And when you get it as officer of this company, you propose to deposit it to the credit of the company in pursuance to the resolution passed here today?

A. Yes, sir.

By Judge BARNES: Where deposit it?

Mr. IVES: Where do you suggest?

Judge BARNES: The banks here in Tucson are good banks; I don't see why you should go to California.

Mr. IVES: Is that satisfactory to you? Judge Barnes suggests that the money be deposited in the banks here at Tucson.

Mr. ZECKENDORF: I have no objection.

Mr. IVES: Is that satisfactory to you, Mr. Shelton?

Mr. SHELTON: Yes, sir.

Mr. IVES: Then Mr. Curtis you will deposit it here in Tucson.

806 Mr. IVES: Mr. Curtis, a bond has been given by Mr. Steinfeld for this \$51,500 garnishee of Mr. Franklin's. You have that bond as officer of the company?

A. Yes, sir.

Mr. IVES: Now, Judge we have gone quote a little distance.

Judge BARNES: Yes, and we will think it over. I think I have stated to you about what Mr. Zeckendorf's feeling is. I don't think

R. K. SHELTON, *Secretary.*

Silver Bell Copper Company.

<i>Silver Bell Copper Company.</i>			
1903.			
May 20	By Imperial Cop. Co. 1st pay.....		\$115,000.00
	To telegrf. transfr. L. Z. Co., N. Y....	75,000	
less ret.	617	\$74,383.00
	Commission paid N. O. Murphy.....		22,500.00
	Albert Steinfeld, Cont.....		18,117.00
		115,000.00	115,000.00
Aug. 23	By Imperial Cop. Co. 1st note.....		\$101,500.00
	To L. Zeckendorf & Co., dep.....	35,000.00	
Sept. 4	" " " ".....	5,000.00	
Oct. 20	To F. J. Heney, Contract.....	1,500.00	
	Garnished S. M. Franklin suit.....	51,500.00	
	Balance on hand.....	8,500.00	
		101,500.00	101,500.00

800

Nov. 23	By Imperial Cop. Co. 2nd note.....	102,987.50	
	To Smith & Ives, Ret.....	500.00	
25	" " " ".....	1,000.00	
Dec. 26	Attachment Bank Cal.....	49,987.50	
	Balance on hand.....	51,500.00	
		<hr/>	
		102,987.50	102,987.50
		<hr/>	
	Balance on hand 1st note.....	8,500.00	
	Balance on hand 2nd note.....	51,500.00	
	Attached Bank of Cal.....	49,987.50	
		<hr/>	
			100,987.50

That in the stockholders' meeting held on the 26th day of December, 1903, hereinabove set out, plaintiff, in voting to rescind said agreement of May 20th, 1903, and the resolution hereinabove mentioned, did not understand or know or believe that anybody claimed or would claim that the action taken on that day by the stockholders of the Silver Bell Copper Company, would operate to give either Albert Steinfeld or the Mammoth Copper Company any right or claim to any of said proceeds of said sale, nor did the directors in good faith understand or believe that the stockholders intended to instruct them to rescind any portion of the agreement and resolution other than that relating to the indemnity agreement hereinbefore mentioned.

XXXIII.

That thereafter on said 26th day of December, 1903, a special meeting of the Board of Directors of said Silver Bell Copper Company was held at which were present J. N. Curtis, R. K. Shelton, Albert Steinfeld and Eugene S. Ives, Attorney for Albert Steinfeld.

That thereupon and at said meeting, Albert Steinfeld resigned as treasurer of said Silver Bell Copper Company, and J. N. Curtis was elected treasurer of said company, and thereupon on motion of R. K. Shelton, acting at the request of said Eugene S. Ives, attorney for said Steinfeld, the following resolution was adopted, viz.:

"Whereas, at the twelfth meeting of the Board of Directors of this company held at the office of the company in the city of Tucson on the 20th day of May, 1903, the proceedings whereof appear upon pages 43, 44, 45, 46, 47 and 48 of the minute book of this corporation, certain resolutions were passed, which said resolutions are set up in full upon said minutes; and,

"Whereas, Simultaneously with the passage of the resolutions, a certain agreement of date May 20th, 1903, was executed and delivered, which said agreement was in the words and figures following, to-wit:

"This Agreement, Made this 20th day of May, 1903, between the Silver Bell Copper Company, a corporation organized and existing under the laws of the Territory of Arizona, party of the first part, and the Mammoth Copper Company, a corporation organized and existing under the laws of the Territory of Arizona, party of the

second part and Albert Steinfeld of Tucson, party of the third part, witnesseth:—

Whereas, The parties hereto have this day agreed to sell certain mining claims and property to the Imperial Copper Company, a corporation, as per written agreements heretofore made, and deeds for which property are now in escrow with the Phoenix National Bank of Phoenix, Arizona; and,

Whereas, The parties hereto desire to settle and determine as between themselves, what disposition shall be made of the proceeds of said sale; and,

Whereas, The said Albert Steinfeld has assumed certain obligations with said Imperial Copper Company as more fully appears in the various agreements heretofore entered into by him in making such sale, and particularly in a certain Guarantee Agreement, wherein amongst other things said Steinfeld guarantees the title to certain mining claims so sold or agreed to be sold, and parties of the first and 2nd part desire to indemnify him against loss by reason of any of said matters or things so done by him;

Now therefore, in consideration of the premises and of the sum of one dollar (\$1.00) by each of the parties hereto to the other in hand paid, receipt whereby is hereby acknowledged, it is hereby mutually agreed, that the purchase price paid and to be paid upon the said sale, shall belong to and be the property of the said Silver Bell Copper Company.

And it is further agreed that the four promissory notes of one hundred thousand dollars (\$100,000) each, this day executed by the Imperial Copper Company to the Silver Bell Copper Company, upon said sale, as well as the proceeds of said promissory notes when collected, shall be held by the said Albert Steinfeld as trustee, and as security for and as indemnity against loss, damage, or expense which may arise to him for or out of, or by reason of any and all obligations and liabilities which he has assumed with the said Imperial Copper Company, or any other person whatsoever.

And it is further agreed, that no dividend shall be declared by the said Silver Bell Copper Company until the stockholders of said company shall first have fully indemnified said Albert Steinfeld against loss, which might arise to him in the future, from or on account of any such obligations or liabilities so assumed by him.

In witness whereof, The said corporation, parties of the first and second part, has caused these presents to be signed by its president and secretary and its corporate seal to be hereunto affixed by resolution of its Board of Directors, and the said Albert Steinfeld has hereunto placed his hand and seal the day and year first above written. In triplicate." And,

Whereas, In pursuance of said agreement four certain promissory notes made by the Imperial Copper Company to the order of the Silver Bell Copper Company were endorsed and turned over to Albert Steinfeld; and,

Whereas, Said Steinfeld duly received the proceeds of the first of said notes and paid out for the benefit of this company a certain proportion thereof; and,

Whereas, The said Steinfeld deposited the three remaining notes with the Bank of California, at San Francisco for collection; and,

Whereas, The said Bank of California presented for collection the first maturing of the said notes, and received the proceeds
815 thereof and turned over to said Steinfeld all of the said proceeds expect the sum of \$49,987.50; and,

Whereas, The said bank still has the last mentioned sum and the two remaining notes; and,

Whereas, Louis Zeckendorf, who appears upon the books of this company to own 250 shares of the capital stock of this company in violation of the rights of the said Steinfeld under the said agreement and resolutions, notified the Bank of California not to pay the said sum of money or to deliver the said notes or the proceeds thereof to the said Steinfeld; and,

Whereas, The said Zeckendorf did thereafter bring suit in the Superior Court of the County of San Francisco and State of California against this company, the Bank of California, Albert Steinfeld, J. N. Curtis and R. K. Shelton, the directors of this company, wherein he filed his verified complaint, in which said complaint he alleged, referring to the said resolution, as follows:

816 That the said pretended resolutions are void and of no effect as against said Silver Bell Copper Company or its shareholders or at all, in that said Steinfeld joined in the vote therefor, and in that the other two directors are in the employ of the said Steinfeld and wholly under his control; and in that said Shelton does not own any shares of stock of said corporation, and in that they were pretended to be adopted at the instigation of said Steinfeld and as part of a claim on his part to defraud said company and its shareholders * * * and said two other directors and defendants Curtis and Shelton then and always were and still are acting solely in the interest of and are under the complete control and dominion of said Steinfeld and blindly, and without consideration of the interest of said corporation, carry out all of his directions.

That it would be a futile and vain proceeding for this plaintiff (Zeckendorf) to demand of said Board of Directors to take proceedings on behalf of said Silver Bell Copper Company against said

817 Steinfeld to recover the moneys and notes so unlawfully held by him, and which he claims to have the right to hold as against said corporation, or to rescind said last mentioned agreement or resolution, because said directors and defendants Curtis and Shelton are acting solely in the interest of and are under the sole control of said Steinfeld and would continue so to be even if informed of the injurious effect of their actions, and would yield to his influence and control even if informed of the purposes and uses for which that influence is exercised; And in which said complaint the said Zeckendorf demanded judgment as follows:

(1) That a receiver be appointed to hold said moneys and said notes in said Bank of California for the benefit of said Silver Bell Copper Company, during the pendency of this suit;

(2) That an injunction issue restraining said Steinfeld from

receiving, and said Bank of California from delivering to him said moneys or said notes now in the custody of said Bank of California:

(3) That said Steinfeld be required to set forth the nature of his claim to said moneys and said notes, and the terms of the agreements referred to in said resolutions, and to account to said Silver Bell Copper Company for moneys received or that may hereafter be received by him belonging to said corporation;

(4) That said resolutions and the agreements therein referred to, be declared null and void."

And,

Whereas, the said resolutions were passed by the Board of Directors of this company, and the said agreement was executed by its officers in good faith and with the sole intent and purpose to advance and protect the interest of this company and of all persons concerned, nevertheless in view of the said actions of the said Zeckendorf, the owner of a large portion of the stock of this corporation, and of the charges and allegations which he has made, and of the hostile attitude which he has assumed toward the entire transaction, and in compliance with his wish, prayer and demand, and in order to avoid litigation; and all of the owners of the stock of the said corporation except the said Zeckendorf having been consulted by the directors, and having acquiesced in the foregoing recitations and in this action about to be taken by this board,

and the said Albert Steinfeld and the Mammoth Copper Company having indicated their willingness and consent thereto, and having offered to sign any paper or papers, and to do upon demand all things and acts necessary to accomplish and consummate a full re-cission of the said agreement; and the said Steinfeld having given to this company an order upon the Bank of California for the said money and notes, and having tendered to this company all of said funds still in his hands, together with a full and complete account of all moneys received and disbursed by him,

Be it resolved:

(1) That the said resolutions passed by the Directors on the said 20th day of May, 1903, be, and the same are, rescinded and repealed.

(2) That the said agreement heretofore recited in full be rescinded and declared null and void.

(3) That the president and treasurer of this company be empowered to receive from the said Steinfeld and from the Bank of California all of the said funds and the two said notes of the Imperial Copper Company which have not yet matured, and to give his proper receipt therefor.

(4) That the officers of this company be instructed to execute with and deliver to said Steinfeld and Mammoth Copper Company, an agreement rescinding the said agreement ab initio and to do and cause to be done all such acts and things as may be necessary to accomplish and consummate the full re-cission of the said agreement; and that J. N. Curtis, the president and

treasurer of the company, be instructed to receive from said Steinfeld the funds tendered by him as hereinbefore recited, and be further instructed to demand and receive from the Bank of California the said money and notes now held by the said bank."

The foregoing resolution was adopted, Mr. Curtis and Mr. Shelton voting in the affirmative, and Mr. Steinfeld being present not voting.

Mr. Steinfeld thereupon made the following statement:

"I concur in the above resolution and consent to the re-cission of the said contract. I have not voted thereon by reason of the fact that it might be stated that I was an interested party."

Mr. Shelton offered the following resolution:

821 "Resolved, that on account of Mr. Albert Steinfeld of funds of the Silver Bell Copper Company, held by him under a certain agreement executed on May 20th, 1903, which has been this day rescinded, which said account is as follows:

Silver Bell Copper Company in Account with Albert Steinfeld.

1903.

May 20	By Imperial Cop. Co. 1st payment.....		\$115,000.00
May 21	To teleg. trans. L. Zeckendorf & Co.....	\$75,000.00	
	Less ret.	617.00	\$74,387.00
	To commission paid N. O. Murphy.....	22,500.00	
	To A. Steinfeld cont.....	18,117.00	
		115,000.00	115,000.00
Aug. 23	By Imperial Cop. Co. 1st note.....		101,500.00
Aug. 23	To L. Zeckendorf & Co., dep.....	35,000.00	
Sep. 3	To L. Zeckendorf & Co., dep.....	5,000.00	
Oct. 20	To F. J. Heney, contract.....	1,500.00	
	To garnishee S. M. Franklin suit.....	51,500.00	
	To balance on hand.....	8,500.00	
		101,500.00	101,500.00
Nov. 23	By Imperial Cop. Co. 2nd note.....		102,987.50
Nov. 25	To Smith & Ives, ret.....	1,500.00	
	To attachment Bank Calif.....	49,987.50	
	Balance on hand.....	51,500.00	
		102,987.50	102,987.50
	Balance on hand 1st note.....		8,500.00
	Balance on hand 2nd note.....		51,500.00
	Attached Bank of California.....		49,987.50
			109,987.50

822 Be, and is hereby audited and approved.

That this plaintiff had no knowledge whatsoever of the holding of said Directors' meeting on the 26th day of December, 1903, until after the 21st day of January, 1904, and had no knowledge until said last mentioned date that any such meeting was planned or contemplated.

That after said directors' meeting and on the said 26th day of December, 1903, and in pursuance of said resolutions of said Direc-

tors' meeting an agreement was executed and delivered, which is defendants' Exhibit S; and in pursuance of said resolution and agreement, on the 26th day of December, 1903, after the adjournment of the stockholders' and directors' meetings held on said day said Steinfeld paid to Curtis, treasurer of the Silver Bell Copper Company, the sum of \$18,117.00.

XXXIV.

That on the 26th day of December, 1903, and prior to the said stockholders' meeting, the said Steinfeld turned over to the said

823 J. N. Curtis, treasurer of the said Silver Bell Copper Company, all funds in his hands belonging to said company except the sum of \$51,500.00 which had been garnisheed in his hands in a suit pending against the said company, instituted by one Selim M. Franklin, and except certain money and two promissory notes which had been deposited by him with the Bank of California in suits instituted by Louis Zeckendorf, and at the same time the said Steinfeld delivered to the said treasurer of the said corporation an order upon the Bank of California, authorizing and requiring the said bank to deliver to the said corporation or its duly authorized officer the said money and notes so deposited by him as aforesaid, and the same were, after December 26th, 1903, and prior to January 10th, 1904, delivered and turned over by said bank to the said treasurer of the said Silver Bell Copper Company, with the knowledge, assistance and consent of said Albert Steinfeld.

That on the 9th day of January, 1904, said Albert Steinfeld paid to Francis and Volkert the sum of \$12,700.00.

824

XXXV.

That on the 16th day of January, 1904, defendants Steinfeld, Curtis and Shelton met as Board of Directors of said Silver Bell Copper Company, no one else being present except Eugene S. Ives, the attorney for said Steinfeld, and no one else having any notice or knowledge of such meeting, and as such board at the request of said Ives and Steinfeld, purported to adopt and pass a resolution and cause the same to be spread upon the minute book of said corporation, reading as follows:

"Whereas, the properties of this company together with certain mining properties belonging to and owned by the Mammoth Copper Company and Albert Steinfeld, respectively, were on or about the 20th day of May, 1903, sold to the Imperial Copper Company for the gross sum of \$515,000, payable \$115,000 in cash and the balance in four promissory notes, each for the sum of \$100,000 with interest at the rate of 6 per cent per annum, payable respectively three, six, nine and twelve months after date; and,

825 "Whereas, deeds properly executed by this company for the properties owned by it, and properly executed by the Mammoth Copper Company for properties owned by it and prop-

erly executed by Albert Steinfeld for properties owned by him, have been deposited in escrow with the Phoenix National Bank, to be delivered to the guarantee, in all of such deeds, to-wit, the said Imperial Copper Company, upon the payment of the said notes and all of them, according to the tenor thereof; and,

"Whereas, simultaneously with the said sale an agreement was made between this company and the said Mammoth Copper Company, and the said Albert Steinfeld, which provided for the disposition of all of the said purchase price; and,

"Whereas, the said agreement was by consent of all parties thereto and of all parties interested therein, rescinded on or about the 26th day of December, 1903; and,

"Whereas, the said Albert Steinfeld did on or about the 26th day of December, 1903, return to this company, by paying the
826 same to the treasurer thereof, the sum of \$319,487.50 upon said purchase price and consideration for the said agreement rescinded as aforesaid; and,

"Whereas, previous to the said rescission of said agreement the treasurer of this company had received the sum of \$319,487.50 upon the said purchase, and has at this time in his hands two of the said notes, to-wit, the notes becoming due on the 20th day of February, 1904, and the 20th day of May, 1904; and,

"Whereas, Albert Steinfeld and the Mammoth Copper Company jointly do claim that the properties owned by them and sold to the Imperial Copper Company as aforesaid, were and are of far greater value than the property owned by this company and sold to the Imperial Copper Company as aforesaid; and,

"Whereas, the said Steinfeld and the Mammoth Copper Company acting jointly as aforesaid have asserted their ownership of and right of possession to more than one-half of the said purchase price, and have offered to accept one-half of the cash re-
827 ceived, and one of the said promissory notes in full of all of their claim to any part or portion of the said purchase price; and it appearing by the books of this company that of the said sum of \$319,387.50 the sum of \$25,000 has been paid to N. O. Murphy and A. S. Donau for commissions effecting the said sale, and that the sum of \$3,000 has been paid to attorneys-at-law for services rendered to this company, and the said \$28,000 being properly a charge upon the whole of said purchase price; and,

"Whereas, Selim M. Franklin has brought suit against this company for the sum of \$51,500, and an attachment has been issued in said suit, and the said sum of \$51,500 has been garnished in the hands of Albert Steinfeld, who at the time of said garnishment was holding that portion of the said purchase price in pursuance of the agreement rescinded as aforesaid and up to this date has been held by him; and,

"Whereas, the said Albert Steinfeld has given this company his bond therefor and has now returned to the treasurer of this company \$25,750 thereof, the receipt whereof is hereby acknowledged;
828

"Now, therefore, be it resolved that upon the receipt from the said Mammoth Copper Company and Albert Steinfeld

of a release jointly and severally of all right and interest in the said purchase price whatsoever, except such as Albert Steinfeld may have as a stockholder of this company, the treasurer of this company be and is hereby authorized and directed to pay to the said Albert Steinfeld the sum of \$145,743.75 in cash, the same being one-half of the said sum of \$319,487.50, the total cash received, less the said sum of \$28,000; and that the treasurer of this company be and is hereby authorized and directed to endorse and deliver to the said Albert Steinfeld one of the said promissory notes."

That said Curtis and Shelton in voting for the adoption of said resolution, and said Curtis in paying out the money and turning over the note thereunder, as hereinafter found, consulted with no person whomsoever, except said Steinfeld and his attorney, Eugene S. Ives, and in so voting and acting, said Curtis and Shelton were under the complete dominion and control of said Steinfeld, and voted and acted on his orders and not otherwise.

XXXVI.

That thereupon said J. N. Curtis, being then the treasurer of said Silver Bell Copper Company and as such having in his possession the cash and under his control the notes of said company above mentioned, and under no other authority or claimed authority than heretofore set out, paid to the said Albert Steinfeld of the funds paid by him as treasurer of the said Silver Bell Copper Company in his, Curtis', hands as such treasurer, the sum of \$145,743.75 in cash (the same being one-half of the sum of \$319,487.50, less the sum of \$28,000) and thereupon delivered to said Albert Steinfeld one of said two promissory notes, and which said funds and notes said Albert Steinfeld received from said Curtis, the treasurer of said Silver Bell Copper Company, and thereupon said Steinfeld appropriated said moneys so received and said note to his own individual use and not to the use or benefit of any other person or corporation whatsoever.

That the said note so delivered to said Albert Steinfeld at the time of said delivery was worth the full amount of the principal and interest thereof, viz: \$100,000.00 with interest thereon from the 20th day of May, 1903, to the 20th day of January, 1904, at the rate of six per cent per annum, and said Steinfeld collected said full sum thereon and retained the same to his own use.

That said Steinfeld also retained the sum of \$25,750, the funds said corporation garnished by S. M. Franklin and which still remained in his hands as treasurer aforesaid, and which with said sum of \$145,743.75 in cash, so paid to him by said J. N. Curtis as treasurer of said company, made a total sum of \$171,493.75 in cash.

That said Albert Steinfeld collected on said note so delivered to him prior to the commencement of this action the sum of \$103,700, which with said sum of \$145,743.75, made a total of \$249,400.75, which said Albert Steinfeld so received from said defend-

ant corporation, and all of which said sum before the commencement of this action said Albert Steinfeld took as his own
 831 property, to his own use, and said Albert Steinfeld thereafter kept the same as his own property and not as the property of any other person, firm or corporation, and not for the use or benefit of any other person, firm or corporation, and that no part of said sum has been paid back to said Silver Bell Copper Company.

XXXVII.

That subsequent to the 10th day of January, 1904, and prior to the 16th day of January, 1904, said Silver Bell Copper Company collected on the other of said two promissory notes the sum of \$103,967, and which said sum was paid into the treasury of said Silver Bell Copper Company.

XXXVIII.

That on the 20th day of January, 1904, the directors of the said Silver Bell Copper Company passed a resolution, declaring a dividend of \$111.00 per share on the capital stock of said Silver Bell Copper Company. Said Albert Steinfeld thereupon collected and received from the treasurer of said corporation the sum of \$111.00
 832 per share as such dividend on the 300 shares of stock belonging to said Silver Bell Copper Company, standing in his name as trustee, as aforesaid, receiving as such dividend on said stock the sum of \$33,300.00 and which said sum the said Albert Steinfeld thereupon converted to his own use and benefit and not to the use or benefit of any other person or corporation whatever, and the same has not, nor has any part thereof, been paid to or for the Silver Bell Copper Company, but the whole thereof with interest from the 26th day of January, 1904, at the rate of 6 per cent per annum remains unpaid. That the said dividend of \$111.00 per share on said 300 shares was paid to the said Albert Steinfeld because of and on account of his control of said corporation. That said money received by said Albert Steinfeld as such dividend on said 300 shares of stock was the money and property of said Silver Bell Copper Company, and said Albert Steinfeld had no right thereto, and had no right to receive the same and convert the same to his own use. That said dividend (except as to said 300 shares of stock standing in the name of Albert Steinfeld as trustee) was regularly declared; That R. K. Shelton
 833 was paid and received the sum of \$111.00 on such dividend, being the dividend on the one share of stock standing in his name; That said J. N. Curtis was paid and received the sum of \$18,870.00, being the dividend on 170 shares standing in his name; That said Albert Steinfeld in addition to said \$33,300.00 was paid and received the sum of \$27,639.00, being the dividend on the 249 shares standing in his name and belonging to him. That plaintiff has now been paid and has received the sum of \$27,750.00, being the dividend on 250 shares; the same being accepted by

plaintiff without prejudice to this action and under agreement that the same should in no manner affect this action.

XXXIX.

That this action is prosecuted by the plaintiff above named, as a stockholder of the said defendant, the Silver Bell Copper Company, and not otherwise, and that all of the sums of money expended by him as and for costs and attorneys' fees in the prosecution of this action are expended for the benefit of the said Silver Bell Copper Company, and not for the benefit of this plaintiff, except as he is a stockholder of said corporation; That 834 this plaintiff, in that regard, has employed as attorneys for the bringing of this action for the benefit of the Silver Bell Copper Company, Edwin A. Meserve of Los Angeles, California, and Frank H. Hereford of Tucson, Arizona, and has agreed to pay the said attorneys reasonable fees for the services rendered in this action, and which said fees and all other expenses and obligations incurred by this plaintiff, in the bringing of this action, should be paid to plaintiff, or to those to whom he is obligated therefor by the said defendant, Silver Bell Copper Company, out of the moneys which it may receive as the result of the bringing and prosecuting of this action; That ten per cent of the amount for which judgment is finally given in this action, is and will be a reasonable amount to be allowed plaintiff as a charge against said Silver Bell Copper Company, as attorneys' fees for bringing and prosecuting this action for its benefit.

XL.

That as hereinabove found, the defendants, Shelton, Curtis and Steinfeld, are the directors of said Silver Bell Copper Company; that said Curtis and Shelton are under the absolute control and dominion of said Steinfeld, and that if 835 any moneys or properties belonging to said corporation should be returned to said corporation, the same would be still in the hands of the same parties and controlled by them and would be again placed under the control of defendant Steinfeld; that it will be unequitable and wrong that said money should again be paid to said corporation and be again placed under the control, dominion and in the custody of said Albert Steinfeld, and it is therefore meet, equitable and proper that a receiver of all of the properties, books and papers of said corporation should be appointed by this Court, in order to receive the money of said corporation and properly apply the same, and that the same further might be properly paid out, used and handled as this Court in the exercise of its discretion may hereafter order, decree and determine.

XLI.

That the \$2,000.00 paid by Steinfeld at the time of the purchase of the said 300 shares of stock was the personal money of said 836 Steinfeld and that said Zeckendorf knew that Steinfeld had paid the same out of his personal money, for and in behalf of the corporation.

XLII.

That Selim M. Franklin at all the times herein mentioned was an attorney-at-law in active practice in the City of Tucson, and that during all of the said times and prior to the month of June, 1903, was the attorney for the said company and the said L. Zeckendorf & Company and the said Albert Steinfeld, and at no time was under the domination or influence of said Steinfeld so as to do anything in any of the transactions involved in this litigation to the advantage of said Steinfeld and against the interest of said company or the said Zeckendorf.

XLIII.

That at no time prior to about the 20th day of May, 1903, did the Nielsen Mining & Smelting Company or the Silver Bell Copper Company offer or agree to repay to Albert Steinfeld any of the several sums of money, or any part thereof, paid by him to Francis & Volkert, or to the English owners of the English group of mines, except as in these findings set forth.

XLIV.

And at no time prior to about the 20th day of May, 1903, did the said Nielsen Mining & Smelting Company or the Silver Bell Copper company agree to assume any obligation which the said Steinfeld incurred in and by the execution of said agreement of date May 16th, 1900, with Francis and Volkert.

XLV.

That all of the money expended by said Steinfeld in the purchase of the Francis and Volkert titles and the English titles to the English group of mines, was the personal money of the said Steinfeld, and that at no time did the said Steinfeld offer to loan to the said company any sums of money whatever for the purchase of either of the titles to said group of mines.

Dated this 30th day of July, 1908.

JOHN H. CAMPBELL, *Judge.*

Filed October 2, 1908.

838 In the District Court of the First Judicial District of the Territory of Arizona in and for the County of Pima.

LOUIS ZECKENDORF, Plaintiff,

VS.

ALBERT STEINFELD, R. K. SHELTON, SILVER BELL COPPER COMPANY (a Corporation), and Mammoth Copper Company (a Corporation), Defendants.

Judgment.

This cause came on regularly for trial before the Court, Honorable John H. Campbell, Judge thereof, presiding, sitting without a jury,

(a jury having been theretofore regularly waived by all parties) on the 2nd day of January, 1908, all parties being present in person, and also by their attorneys; evidence oral and documentary having been regularly introduced and offered by the respective parties and received by the Court, the cause was in regular order and in due course and form argued to the Court, and submitted to it for its decision; after due consideration of the pleadings and of all admitted evidence in the case, and being fully advised in the premises, 839 wherefore by virtue of the law and the premises aforesaid, it — hereby ordered, adjudged and decreed:

First. That the plaintiff recover nothing upon the first cause of action in the complaint set forth, and as to the said first cause of action the defendants go hence without day.

Second. That Albert Steinfeld upon the second cause of action in said complaint set forth, pay to the defendant the Silver Bell Copper Company, and that the said Silver Bell Copper Company do have and recover from said Albert Steinfeld, the sum of \$20,850.00 with interest thereon at the rate of six per cent per annum from the 20th day of January, 1904; that plaintiff do have execution for the said sum of \$20,850.00 and interest thereon from said date against the said Albert Steinfeld, the recoveries on said execution to be paid to the defendant the Silver Bell Copper Company or to the receiver of said company to be appointed as in this judgment provided.

Third. That L. Zeckendorf, plaintiff in the above entitled 840 action, do have and recover of and from Albert Steinfeld his plaintiff's costs in this action herein taxed at the sum of \$662.60 and that plaintiff do have execution in his favor and against said defendant therefor.

Fourth. That plaintiff, out of the said money recovered and to be recovered by said Silver Bell Copper Company from the said Albert Steinfeld, do have an- recover of and from the said Silver Bell Copper Company, and be paid by the said Silver Bell Copper Company the sum of \$2,652.50 as and for attorneys' fees for the bringing of this action and the prosecution of the same up to and including the entry of this judgment; and it is further ordered that the receiver hereafter to be appointed herein and hereafter named, do pay to said plaintiff the said sum of \$2,652.50 out of the said moneys to be recovered by said Silver Bell Copper Company from the said Albert Steinfeld.

It is further ordered, adjudged and decree- and the Court does hereby order that Hiram W. Fenner be, and he is, hereby ap- 841 pointed receiver of all property, money, books and assets of any kind or character of or belonging to the said Silver Bell Copper Company and any person or persons having any money or assets belonging to the said Silver Bell Copper Company are hereby ordered to turn over and deliver the same to the said receiver, the same to be held by the said receiver and retained and kept in possession, and to be distributed, paid out and disbursed upon the orders of this Court to be made from time to time in this action; said receiver to execute the usual oath of office and to give and execute a bond in the sum of \$— in the usual form of receiver's bond, to be approved

by this Court, for the faithful performance by him of his duties, as receiver; and the said Hiram W. Fenner as such receiver immediately upon the filing of his oath and the approval of his bond, as aforesaid, is hereby ordered and directed to take immediate possession of all the moneys, property and other assets of the said Silver Bell Copper Company, and to hold and disburse the same in accordance with the orders and judgment herein contained, and in accordance with the orders to be made by this Court from time to time hereafter.

It is further ordered, adjudged and decreed that upon the final termination of this action, the said Silver Bell Copper Company shall be dissolved, and that thereupon all its debts and liabilities shall then be paid and discharged, and thereupon all property, money and assets of such corporation then remaining shall be distributed among its stockholders in the proportions of their several ownership of stock.

The said dissolution, payments, disbursements and distributions to be done and accomplished by orders of this Court for that purpose in this action made and to be made.

It is further ordered, adjudged and decreed That Albert Steinfeld holds the sum of \$25,750 money of said Silver Bell Copper Company, in his hands as and for security to him against any liability on account of the garnishment levied on him in the action of Franklin vs. Silver Bell Copper Company, said Steinfeld to account to said corporation or to the receiver of said corporation hereafter appointed for said sum immediately upon the final determination and settlement of this action, and to pay the said Silver Bell Copper Company or to such receiver the balance of said sum, if any, after deducting therefrom such sums, if any, that said Steinfeld may properly and in accordance with law pay or have paid for the benefit of the said Silver Bell Copper Company.

Done in open court this 30th day of July, 1908.

JOHN H. CAMPBELL, *Judge*.

Filed October 4, 1908.

Assignments of Error by the Appellant, Louis Zeckendorf, as the Same Appear in His Brief upon the Second Appeal to the Supreme Court of the Territory of Arizona, Filed January 11, 1909, Cause No. 1101.

844

Assignments of Error.

I.

The Court erred in making the finding that Steinfeld did not purchase the English group of mines for and as the property of the Silver Bell Copper Company (Finding 13), for the reason that the said finding is misleading, in that it does not show that the said properties were actually purchased by Steinfeld for the Silver Bell Copper Company subject to his intention that they would be claimed by him for L. Zeckendorf and Company, if he could not purchase

for the Silver Bell Copper Company the shares of stock belonging to Nielsen in the Silver Bell Copper Company.

II.

The Court erred in not finding as a fact that the proposition of July 15, 1901, and the action of the officers and directors of the Silver Bell Copper Company thereon as set forth in Finding 17, was by all parties intended to be a declaration of trust, viz., that Steinfeld held the legal title to the English group of mines, the Nielsen mines, and the 300 shares of Nielsen stock in trust for the Silver Bell Copper Company, for the reason that the uncon-
845 tradicted evidence shows that that was the intent of all parties, and that the proposition was made and action taken thereon with the object of accomplishing that purpose.

III.

The Court erred in not finding as a fact that Steinfeld did orally and in writing assert and declare that he was going to purchase the English group of mines and the said Nielsen shares of stock for the Silver Bell Copper Company, for the reason that he did so declare and assert orally and in letters to Louis Zeckendorf.

IV.

The Court erred in not finding as a fact that Steinfeld repeatedly, to Zeckendorf and other persons, declared in writing that the English group of mines was the property of the Silver Bell Copper Company, for the reason that Steinfeld did so declare in his letters to Zeckendorf and others, and did in effect so declare, in causing the president of the Silver Bell Copper Company to make reports and maps describing the said group of mines as belonging to the Silver Bell Copper Company, and in sending out the said reports and maps over his, Steinfeld's signature, as being correct reports and maps.

V.

The Court erred in not finding as a fact that the acts of
846 Steinfeld in purchasing the English group of mines, the Nielsen mines and the Nielsen stock, and all thereof, were his acts as an agent of the Silver Bell Copper Company, for the reason that the said acts were each and all taken and performed, with knowledge on his part of the necessity of their being performed by an agent or representative of the Silver Bell Copper Company; with knowledge of the fact that he knew of the necessity of their performance, solely by reason of his being an agent of the Silver Bell Copper Company, and with knowledge of the fact that he had assumed and was performing, and was expected to perform all services of that character for and on behalf of the Silver Bell Copper Company.

VI.

The Court erred in not finding as a fact that Steinfeld in purchasing and taking the legal title to the English group of mines, the Nielsen mines, and the 300 shares of Nielsen stock, did so in trust as an agent of the Silver Bell Copper Company, and that the title to said properties was taken in Steinfeld's name solely for the purposes of protecting and advancing the best interests of the corporation, for the reason that the evidence shows that Steinfeld was the agent of the corporation having charge and control of its entire business and property, upon whom rested the responsibility for doing
847 everything in such matters as was for the best interest of the corporation, and the said purchase being as shown by the evidence, for the best interests of said corporation.

VII.

The Court erred in finding that Steinfeld at no time offered to loan the Silver Bell Copper Company any money for the purchase of either of the titles to the English group of mines, for the reason that the said finding is misleading in this, that Steinfeld did advance the money for the benefit of the Silver Bell Copper Company, and so declared in letters to Zeckendorf, which advances were intended as a loan to the Silver Bell Copper Company.

VIII.

The Court erred in not rendering judgment for the Silver Bell Copper Company upon what is termed the first cause of action, viz; the return of the money paid to Steinfeld under the theory that he was the owner of the English group of mines, for the reason that the evidence shows that he was never at any time such owner, but at all times held the said mines and all thereof as the trustee, constructive and expressed, of the Silver Bell Copper Company, and that the said sums of money and all thereof were paid to the said Steinfeld without any consideration or right, and in fraud of the rights of
848 the stockholders of the Silver Bell Copper Company.

IX.

The Court erred in not granting plaintiff's motion for a new trial for the following reasons:

1. That the Court erred in admitting evidence.
2. That the Court erred in rejecting evidence.
3. That the evidence does not sustain the judgment.
4. That the judgment is contrary to the evidence.
5. That the judgment is contrary to the law.
6. That the evidence is insufficient to sustain the findings of fact or any one of them.
7. That the Court has failed to find upon questions of fact.

And for the further reasons hereinabove assigned and more particularly pointed out in the brief following:

X.

The Court erred in granting defendant's motion retaxing costs for the reason that the Supreme Court of the Territory as such has no power directly to tax costs, but such power must be expressed by instructing the lower Court to enter costs in accordance with the provisions of the Statutes of the Territory.

XI.

The Court erred in only awarding plaintiff the sum of \$2,652.50 out of the money recovered and to be recovered by the Silver Bell Copper Company from Albert Steinfeld herein, as and for attorneys' fees, for the reason that the said sum is wholly inadequate; is not a just and reasonable compensation for the services performed by the said attorneys, nor is it commensurate with the services rendered the Silver Bell Copper Company herein.

850 Assignments of error by the defendants-appellants Albert Steinfeld et al., as the same appear in their brief upon the second appeal to the Supreme Court of the Territory of Arizona. Cause No. 1101. Filed January 15, 1909.

Second Cause of Action Regarding the Three Hundred Shares of Stock.

Assignments of Error.

I.

The court erred in finding,
 "That said Albert Steinfeld took said 300 shares of stock in his name as 'trustee' and all times after January 19th, 1901, held said stock in his name as such trustee, but for the Silver Bell Copper Company said Silver Bell Copper Company during all such times and now being the equitable and real owner thereof," for the reason that there is no evidence to sustain such finding.

II.

The court erred in finding that,
 "His (Steinfeld's) controlling purpose in so doing (shutting down the mine) being to obtain from Nielsen for the corporation, the ownership of the said 300 shares of stock then owned and held by him" (Finding VIII), for the reason that there is no evidence to sustain such finding and no allegation in the complaint upon which to base the same.

851

III.

The court erred in refusing to find as requested by the defendants,
 "That Albert Steinfeld did not at any time prior to the 29th day of June, 1900, or upon such date, loan to the Nielsen Mining and

Smelting Company or agree to loan said company the sum of \$2,000.00 or the sum of \$10,000.00 or any sum whatever wherewith the said company might purchase from Carl Nielsen and Mary Nielsen, his wife, or either of them the 300 shares of stock of the Nielsen Mining and Smelting Company which were owned by the said Carl Nielsen or Mary Nielsen, his wife,"

for the reason that the facts so requested to be found were material and were proven by the uncontradicted testimony.

IV.

The court erred in refusing to find as requested by the defendants, that

"At no time prior to about the 20th day of May, 1903, did the Nielsen Mining and Smelting Company or the Silver Bell Copper Company agree to repay to the said Albert Steinfeld the said sum of \$2,000.00 paid by him on the said 29th day of June, 1900, as aforesaid, or any part thereof"

852 for the reason that the facts so requested to be found were material and were proven by the uncontradicted testimony.

V.

The court erred in finding that,

"Said mine was not shut down because said mine could not have been worked at a profit, for the same could have been worked at a substantial profit," for the reason that there is no evidence to sustain such finding.

VI.

The court erred in finding that said Mammoth or Old Boot mine during the fall of the year 1899, and up to the time of the closing of said mine in the spring of 1900, was being worked at a substantial profit (Finding VII), for the reason that there is no evidence to sustain such finding.

VII.

The court erred in rendering judgment in favor of the plaintiff and in denying defendants' motion for a new trial for the reason that the facts found by the court are not sufficient to support a judgment founded upon the allegations of the complaint.

VIII.

The court erred in appointing a receiver, for the reason that inasmuch as the 300 shares of stock stood in Steinfeld's name as trustee it was not an act of corporate malfeasance to issue a dividend
853 check to the order of Steinfeld, trustee, and deliver the same to Steinfeld.

IX.

The court erred in finding that,
 "Zeckendorf knew that Steinfeld had paid the same (\$2,000) out
 his personal money for and in behalf of the corporation," (Find-
 ing XLI)

for the reason that there is no evidence to sustain the said finding.

X.

The court erred in finding that,
 "Said Albert Steinfeld thereupon collected and received from the
 treasurer of said corporation, the sum of \$111 per share as such divi-
 dend on the 300 shares of stock,"

for the reason that there is no evidence to support said finding, the
 evidence being that the said dividend was paid by a check to the order
 Albert Steinfeld, trustee.

54 (First Cause of Action, English Group of Mines.)

Assignments of Error.

I.

The court erred in finding,
 "That under said operation, large bodies of ore in said mine were
 developed and were found to extend to within such a distance of the
 southern boundary line thereof, being the dividing line between said
 mine and the Prospector mine, one of the mines belonging to the
 English group of mines hereinafter referred to, that it became evi-
 dent that said ore bodies then developed underneath the ground in
 said Mammoth mine ran into said Prospector mine and other of said
 English group of mines, the said facts being ascertainable alone from
 an examination and inspection of the underground workings of said
 Mammoth or Old Boot mine" (Finding VI) for the reason that there
 is no evidence to sustain such finding, and that the facts found are
 necessarily a matter of conjecture.

II.

The court erred in finding that said Mammoth or Old Boot mine
 during the fall of the year 1899, and up to the time of the closing of
 the mine in the spring of 1900, was being worked at a substantial
 profit (Finding VII) for the reason that such finding is not sustained
 by the evidence.

55

III.

The court erred in finding as follows,
 " * * * and at the same time ordered said Mammoth mine to
 be closed down and all work therein to be stopped, as soon as the
 coke and ore on hand should be used up. His controlling purpose

in so doing being to obtain from Nielsen for the corporation the ownership of the said 300 shares of stock then owned and held by him, and in order that the English group of mines, so called, and the Francis-Volkert titles thereto might be purchased at a nominal or small sum, without the owners thereof obtaining knowledge through the workings of said Mammoth mine and the showing of ore bodies therein that said ore bodies probably did and would extend into said English group of mines; and said mine was not shut down because said mine could not have been worked at a profit, for the same could have been worked at a substantial profit," (Finding VIII) for the reason that said finding is not sustained by the evidence, and that the facts found are speculative.

IV.

The court erred in finding,

"That by the time said mine was re-opened the price of copper had so depreciated that the profits that could be derived from the workings of said Old Boot mine and adjoining mines were 856 very much less than at the time said Old Boot mine was cloase- down," (Finding XIV) for the reason that the said finding is not sustained by the evidence.

V.

The court erred in finding that,

"* * * if said development had not been stopped by said Steinfeld but had been continued during the operation of said smelter, sufficient ore would have been developed to have kept the smelter continuously supplied, and in consequence thereof said Silver Bell Copper Company sustained great damage," (Finding XIV) for the reason that said finding is not sustained by the evidence and is obviously conjectural.

VI.

The court erred in finding,

"That in making and in presenting the said proposition (proposition, July 15, 1901) the said Steinfeld was not influenced by the advice given him by said Franklin concerning his relations and duty to the said company," (Finding XVII, Page 782) for the reason that said finding is not sustained by the evidence.

VII.

The court erred in finding,

"That neither Albert Steinfeld nor said Mammoth Copper Company at any time after July 15, 1901, made or asserted any 857 claim to or right in any of said mines or property, except such as are recited in the minutes of the meetings of the directors of the Silver Bell Copper Company.

That plaintiff knew nothing of said proposal or of the facts con

cerning the purchase of said mines, properties or stock, and of the prices paid therefor, or of the circumstances surrounding the same until long after May 20th, 1903, except that plaintiff knew that said Steinfeld had, during the year 1899, and the early part of the year 1900 reported to plaintiff that the purchase of the same was desirable and should be accomplished and that said Steinfeld intended for the company to acquire the same, and further that when said Steinfeld returned from Europe after concluding the purchase of the English titles to said English group of mines, he advised and told plaintiff that he had purchased the same," (Finding XVIII)

for the reason that the first paragraph of said finding is not sustained by the evidence and the balance thereof is misleading, and immaterial, in that the plaintiff had full opportunity to know all of the facts found not to have been known by the plaintiff.

VIII.

The court erred in finding,

858 "That at the time said price of \$515,000 was fixed for said entire properties, and Steinfeld intended to renew and permit the corporation to accept the terms of the proposition dated July 15, 1901, as extended on October 1st, 1901, and the officers of said Silver Bell Copper Company expected the corporation to avail itself of said offer so that the whole of said price would be paid to and become the property of said Silver Bell Copper Company," (Finding XX)

for the reason that said finding is not sustained by the evidence it being clear from the evidence that Steinfeld did not intend to renew the proposition of July 15, 1901, except upon the condition that the company would guarantee Steinfeld against damage or loss by reason of the various transactions by which he acquired the 300 shares of stock, and the English group of mines.

IX.

The court erred in finding,

859 "That in the stockholders' meeting held on the 26th day of December, 1903, hereinabove set out, plaintiff in voting to rescind said agreement of May 20th, 1903, and the resolution hereinabove mentioned, did not understand or know or believe that anybody claimed or would claim that the action taken on that day by the stockholders of the Silver Bell Copper Company, would operate to give either Albert Steinfeld or the Mammoth Copper Company any right or claim to any of said proceeds of said sale, nor did the directors in good faith understand or believe that the stockholders intended to instruct them to rescind any portion of the agreement and resolution other than that relating to the indemnity agreement hereinbefore mentioned," (Finding XXXII, Page 830) for the reason that said finding is not sustained by the evidence.

X.

The court erred in finding,

"That said Curtis and Shelton in voting for the adoption of said resolution, and said Curtis in paying out the money and turning over the note thereunder, as hereinafter found, consulted with no person whomsoever, except said Steinfeld and his attorney Eugene S. Ives, and in so voting and acting, said Curtis and Shelton were under the complete dominion and control of said Steinfeld, and voted and acted on his orders and not otherwise," (Finding XXXV, Page 849)

for the reason that said finding is not sustained by the evidence.

XI.

The court erred in finding that the defendant Shelton as director and secretary of the corporation was at all the times involved in this action, but the representative of said Albert Steinfeld, and voted as ordered, directed and requested by him, and not otherwise
860 (Finding III) for the reason that there is no evidence to sustain such finding.

XII.

The court erred in finding that at all the times subsequent to June 6, 1903, J. N. Curtis, as a director and officer of the Silver Bell Copper Company was under the complete dominion and control of said Steinfeld, and as such director or other officer did whatsoever said Steinfeld requested or directed, and in finding that at no time and under no circumstances subsequent to June 6th, 1903, did the said Curtis as director or other officer of the said corporation, do any act, take any step or cast any vote except as requested or directed by the said Steinfeld (Finding III)

for the reason that said finding is not sustained by the evidence.

861 . *Opinion of the Supreme Court of the Territory of Arizona
Upon Second Appeal. Filed March 20, 1909.)*

No. 1101.

In the Supreme Court of the Territory of Arizona.

LOUIS ZECKENDORF, Appellant,

vs.

ALBERT STEINFELD et al., Appellees.

Appeal from District Court, Pima County.

Before Mr. Justice Campbell.

Mr. Edwin A. Meserve and Mr. Frank H. Hereford, for appellant.

Mr. Francis J. Heney and Mr. Eugene S. Ives, for appellees.

SLOAN, J.:

This is the second appeal which has been taken in this cause to this court. We reversed the case on the first appeal upon the ground that the judgment which was entered in the court below was not sustained by the findings. 86 Pac. 7. The cause was remanded for a new trial. Upon the second trial by stipulation of counsel, the case was submitted upon the evidence put in upon the first trial, except that certain testimony, deemed by the parties immaterial under the issues, was eliminated. As this record is voluminous, and as

862 both parties have appealed from the judgment, a full statement of the facts is made necessary for a complete understanding of the questions presented for our determination.

Louis Zeckendorf, as a stockholder of the Silver Bell Copper Company and in its behalf, brought this suit against Albert Steinfeld, R. K. Shelton and J. N. Curtis individually and as officers and directors of said company, and against the Mammoth Copper Company, to recover for said Silver Bell Copper Company the sum of \$338,710.15 and 300 shares of the stock of the latter which he alleged had been wrongfully appropriated by the defendant, Steinfeld, and to be in his possession, and which rightfully was the property of the said company; that this wrongful appropriation was made through the aid and assistance of the defendants, Shelton and Curtis, as directors of the Silver Bell Copper Company. The plaintiff prayed for an accounting, the return of the money and shares of stock alleged to have been thus appropriated, and for costs, attorneys' fees and the appointment of a receiver. The answer of the defendants contained a general and specific denial of the wrong doing complained of; and set up, that the money and shares of stock sued for were the property of Steinfeld and rightfully in his possession; that this money represented in part the proceeds from a sale of mining property which had been purchased by him and held in his own

863 name and which had been sold in conjunction with property belonging to the Silver Bell Copper Company; that the remainder of the money had been rightfully paid Steinfeld in the way of dividends upon the shares of stock of the Silver Bell Copper Company owned by him and standing in his name, including the 300 shares of stock mentioned in the complaint, and that these dividends had been declared from the proceeds derived from the sale of the mining property belonging to the company.

The court below gave judgment for the plaintiff for the sum of \$20,800.00 being the amount of the dividends declared upon said 300 shares of stock after deducting a certain sum paid out by Steinfeld in the purchase of the same from the original owner, and denied him any relief upon the cause of action set up in the complaint based upon the alleged misappropriation of the proceeds of the sale of the mining property claimed by Steinfeld as his individual property, the title to which was in his name. The court appointed a receiver to disburse the money thus adjudged to be wrongfully appropriated among the stockholders of the Silver Bell Copper Company and to close up the affairs of the latter company. From this judgment both parties have appealed.

The court found the facts to be as follows:

From 1878, and during all the times herein mentioned, the plaintiff, Louis Zeckendorf, and the defendant, Albert Steinfeld, 864 were partners engaged in the mercantile business in Tucson under the name of L. Zeckendorf & Company. The defendant, Steinfeld, under the terms of the partnership, was the active manager and in the control of the business of the firm. The plaintiff was a resident of the City of New York and only occasionally visited the Territory. As ancillary to their business the firm became more or less interested in various mining enterprises. A property situated in Pima County, known as the Old Boot mine, prior to January, 1899, was held by Steinfeld as trustee for William Zeckendorf and his wife, Julia Zeckendorf. One Carl Nielsen had been given a contract by Steinfeld for working and operating said property on a royalty and had become indebted to the firm of L. Zeckendorf & Company in the operation of the mine. On the last mentioned date, in order to protect the firm on account of this indebtedness Steinfeld caused a corporation to be formed under the name of the Nielsen Mining & Smelting Company, to which was transferred Nielsen's interest under his contract, the machinery and other personal property owned by him and used in its operation, in consideration of all of its capital stock and the assumption by the corporation of his debts to L. Zeckendorf & Company. At the time of the organization of the company Steinfeld, as trustee for William and Julia Zeckendorf, gave the corporation an option to purchase the Old Boot mine 865 for \$25,000.00 payable in installments of \$2,500.00 each. Nielsen assigned to L. Zeckendorf & Company 670 shares of the capital stock and to Steinfeld as trustee 30 shares of the capital stock, retaining for himself the balance of 300 shares of the capital stock. The firm of L. Zeckendorf & Company put one share in the name of the defendant Shelton, to qualify him as a director, and gave

170 shares to defendant Curtis, in consideration of services thereafter to be performed by the latter for the company, and retained 499 shares for itself. The authorized capital stock of the company was \$25,000.00. The defendant Shelton was an employee of L. Zeckendorf & Company and the defendant Curtis had charge of the mining business of the firm. Curtis was elected director and president of the company, and Shelton director and secretary. Nielsen was elected a director and became manager and superintendent of the company. Steinfeld, while not an officer or director of the company, was, never the less, recognized as the ruling manager of the corporation and was, in fact, in control, through the officers, of its affairs. The name of the corporation was subsequently changed to the Silver Bell Copper Company, and we will hereafter speak of it by this name.

Adjacent to and surrounding the Old Boot mine was a group of mining claims known as the English Group which was owned, 866 at the time of the organization of the corporation, by residents of England. On the first of January, 1900, these mining claims were relocated by one Francis and one Volkert under the claim that the title of the English owners had become forfeited. Steinfeld, through Curtis and his relations to the corporation and from personal inspection, learned that the English group contained ore bodies of great value, and that the ore body in the Old Boot mine extended into the ground embraced in the English group, and was advised by Curtis that it was desirable that the title to the English group should be acquired so that the two properties might be held and sold as one group thereby increasing the value of the company's property. Early in the year 1900 Steinfeld became dissatisfied with Nielsen's management of the property and determined to get rid of him by buying his shares of stock. Under the advice of Steinfeld the directors discharged Nielsen and appointed Curtis in his place and stopped work on the Old Boot mine.

The court found, that Steinfeld's purposes in closing the mine were to effect a purchase from Nielsen of the 300 shares of stock held by him, and also that the English group of mines might be purchased from the English owners, as well as the Francis-Volkert title, at a nominal or small sum; that although the mine was paying, 867 and at the time worked at a profit, its closing down was to prevent the owners of the English group from obtaining knowledge that the ore body of the Old Boot property did and would extend into the ground covered by the English group.

At the time of the closing down of the Old Boot mine the Silver Bell Copper Company was indebted to L. Zeckendorf & Company about \$30,000.00 in excess of the value of matte and bullion held by the latter as security for the company's indebtedness. On May 16th, 1900, Steinfeld purchased the title held by Francis and Volkert to the English group; at the same time he organized the Mammoth Copper Company for the purpose of taking over this title. The stock of this company was in fact owned and held by Steinfeld individually. On June 29th, 1900, an agreement was entered into by and between Steinfeld and the Silver Bell Copper

Company, as parties of the first part, and Nielsen and his wife, as parties of the second part, whereby the latter was to sell to the former the 300 shares of stock belonging to Nielsen, together with an interest in two mining claims adjoining the Old Boot in consideration of \$2,000.00 to be paid Nielsen in cash and the further sum of \$10,000.00 which was to be paid out of the proceeds of a sale of said mine. After this agreement was executed the 300 shares of stock were thereupon transferred on the books of the company to Steinfeld as trustee. In December, 1900, Steinfeld went to England and there acquired the title to the English group from 868 the English owners and took the title in his own name. He paid for this title with his own money.

The court found that Steinfeld, in making the purchases of the Francis-Volkert title and of the English title to the English group, intended that the property should be his own and not the property of the Silver Bell Copper Company, but did have the purpose and intent of offering to the company the opportunity to take over the title in consideration of its reimbursing him for his outlay in acquiring said title; that he expected the corporation would do this, but, should it not, he would then hold them as his own. Soon after the purchase by Steinfeld of the English title Curtis consulted with S. M. Franklin, the attorney for the Silver Bell Copper Company, and who was also the attorney for L. Zeckendorf & Company, and the defendant Steinfeld, with regard to the ownership of the 300 shares of stock purchased from Nielsen and the English group. Steinfeld was then claiming to be the owner of both the stock and the mines. As a result of this action of Curtis, Franklin told Steinfeld that under the circumstances of his purchases he held both the stock and the English group as trustee for the Silver Bell Copper Company; that because of his relation to the company he had neither the right to purchase the stock or mines for himself nor the right to compel the company to assume the purchases with- 869 out the consent of its stockholders at a meeting at which some one other than Steinfeld should vote the shares belonging to L. Zeckendorf & Company, and that if the corporation should then refuse to ratify the transactions Steinfeld could then rightfully thereafter hold the stock and mines as his own. Acting under this advice on July 15th, 1901, Steinfeld handed to Shelton, secretary of the company, an agreement signed by himself and addressed to the company, in which he recited in detail the circumstances of his purchase of the English group of mines and of the Nielsen stock and the interest in the mining claims held by him, and the terms under which the Nielsen stock purchased was made, and stated his willingness to sell and convey both the English group and the shares of stock to the company upon its paying him the money which he had expended in the purchase thereof, with interest, and upon its assuming and guaranteeing to carry out the terms of the Nielsen contract of purchase, as well as the contract of purchase of the Francis-Volkert title, on or before October 15th, 1901, and would further agree in writing to do the annual assessment work on the mines. It was further expressed in the agreement that if

the company should fail to carry out the terms of the proposition when Steinfeld would thereafter hold the property as his own. After the receipt of this document from Steinfeld the board of directors of the company on the same date adopted a resolution calling for the holding of a stockholders' meeting to take appropriate action on Steinfeld's proffer, but no stockholders' meeting was in fact called or held under this resolution and no action was taken by the stockholders under it. On October 1st, 1901, at a meeting of the stockholders of the company it was agreed by Steinfeld, in consideration of the corporation doing the assessment work on the mines for the years 1900, 1901, 1902, to extend his proposition of July 15th, 1901, to September 15th, 1902. It was resolved at this meeting that a stockholders' meeting should be called to act on Steinfeld's proposition not later than September 15th, 1902, but no stockholders' meeting was ever called or held for this purpose, nor was any action taken by the stockholders under this resolution. During all the time that the proposition of Steinfeld was pending the Silver Bell Copper Company was in possession of the English group and worked and operated it in connection with the Old Boot mine. In 1901 and at other times Curtis, under the direction of Steinfeld, made various maps and reports of the property in which the English group was spoken of as part of the Silver Bell Copper Company's property. These maps and reports were sent to plaintiff and others, and various efforts made by Steinfeld to sell the property as a whole, including the English group. As the result of these efforts to sell, on May 20th, 1903, the Imperial Copper Company entered into an agreement with the Silver Bell Copper Company and with Steinfeld and the Mammoth Copper Company for the purchase of the entire property for the sum of \$515,000.00. In this agreement Steinfeld individually guaranteed the title to the mines for a definite length of time. The terms of the sale called for the payment of \$115,000.00 cash and four notes of \$100,000.00 each made payable to the Silver Bell Copper Company. It was further agreed that these notes and their proceeds should be held by Steinfeld until released from his personal obligation in guaranteeing said title. On the same day an agreement in writing was executed by J. N. Curtis as President of the Silver Bell Copper Company and in its name, and by Steinfeld and the Mammoth Copper Company, which read as follows:

"This agreement made this 20th day of May, 1903, between the Silver Bell Copper Company, a corporation organized and existing under the laws of the Territory of Arizona, party of the first part, and the Mammoth Copper Company, a corporation organized and existing under the laws of the Territory of Arizona, party of the second part, and Albert Steinfeld, of Tucson, party of the third part, witnesseseth:

"Whereas, the parties hereto have this day agreed to sell certain mining claims and property to the Imperial Copper Company, a corporation, as per written agreements heretofore made, and deeds for which property are now in escrow with the Phoenix National Bank, of Phoenix, Ariz., and

"Whereas, the parties hereto desire to settle and determine as between themselves, what disposition shall be made of the proceeds of the sale; and

"Whereas, the said Albert Steinfeld has assumed certain obligations with the said Imperial Copper Company, as more fully appears in the various agreements heretofore entered into by him in making this sale, and particularly in a certain Guarantee Agreement, wherein, amongst other things, said Steinfeld guarantees the title to certain mining claims so sold or agreed to be sold, and the parties of the first part desire to indemnify him against loss by reason of any of the said matters or things so done by him.

"Now, therefore, in consideration of the premises, and of the sum of one dollar (\$1.00) by each of the parties hereto to the other in hand paid, receipt whereof is hereby acknowledged, it is hereby mutually agreed that the purchase price paid and to be paid upon the sale, shall belong to and be the property of the said Silver Bell Copper Company.

"And it is further agreed that the four promissory notes of one hundred thousand dollars (\$100,000.00) each, this day executed by the Imperial Copper Company, to the Silver Bell Copper
873 Company, upon said sale, as well as the proceeds of said promissory notes when collected, shall be paid by the said Albert Steinfeld, as trustee, and as security for, and indemnity against loss, damage or expense which may arise to him for or out of, or by reason of any and all obligations and liabilities which he has assumed with the said Imperial Copper Company, or any other person whatsoever.

"And it is further agreed that no dividend shall be declared by the said Silver Bell Copper Company until the stockholders of said company shall first have fully indemnified said Albert Steinfeld against loss, which might arise to him in the future, from or on account of any such obligations or liabilities so assumed by him."

After the agreement of sale had been executed and on the same day the board of directors of the Silver Bell Copper Company met to take action upon the matter of the sale and the ratification of the above agreement. The minutes of the meeting recite that the President reported the fact of the agreement of sale and the terms thereof and also of the agreement between the Silver Bell Copper Company, Albert Steinfeld and the Mammoth Copper Company guaranteeing Steinfeld from any loss by virtue of his guarantee agreement with the Imperial Copper Company; they further recite that Steinfeld had again submitted for acceptance the proposition

which had theretofore been submitted by him on the 15th
874 day of July, 1901, and later extended until September 15th, 1902, with the additional provisions that the company should assume and pay a commission which Steinfeld had agreed to pay for negotiating the sale to the Imperial Copper Company, and should be indemnified against loss by reason of another asserted claim for a commission, and further that the company should indemnify him against loss, damage or expense by reason of his having guaranteed the titles to the mines sold to the Imperial Cop-

per Company as set forth in the guarantee agreement between the Silver Bell Copper Company, the Mammoth Copper Company and Steinfeld. The minutes further recite that thereupon a resolution was adopted accepting Steinfeld's proposition and ratifying, approving and confirming the sale to the Imperial Copper Company and the agreement of indemnity made by the company with the Mammoth Copper Company and Steinfeld. After the execution of these agreements and the ratification of the same by the board of directors the proceeds of the sale, including the promissory notes, were turned over to Steinfeld under the agreement and by him deposited in a bank in San Francisco, except the sum of \$51,500.00 which had been attached in a suit against the Silver Bell Copper Company which was filed after the sale had been made to the Imperial Copper Company. The plaintiff, Zeckendorf, being dissatisfied with the disposition made of the proceeds of the

875 sale brought a suit in San Francisco on behalf of the company to recover the same. On December 26th, 1903, a meeting of the stockholders of the Silver Bell Copper Company was held in Tucson at which both Zeckendorf and Steinfeld were present and an attorney representing each, as were also Shelton and Curtis. The purpose of this meeting was to adjust the difficulties which had arisen between Zeckendorf and Steinfeld growing out of the disposition of the proceeds of the sale and the litigation which had been instituted by Zeckendorf in relation thereto. At this meeting a resolution was passed rescinding and annulling the agreement of May 20th, 1904, and the resolution of the board of directors of the same date. In the resolution was set forth a copy of the agreement of May 20th, and the resolution of the board specifically referred to and both were declared to be null and void. This action of the stockholders was taken with the consent and acquiescence of all the parties to the agreement of May 20th. After the adjournment of the stockholders' meeting the board of directors of the Silver Bell Copper Company met and adopted a similar resolution. At this meeting Steinfeld resigned as Treasurer of the company and Curtis was elected Treasurer in his stead. Steinfeld then paid to Curtis the sum of \$18,117.00 which had theretofore been paid to him under the agreement and resolution of May 20th, and turned over to Curtis all the funds in his hands of the

876 proceeds of the sale except the sum of \$51,500.00 which had been garnisheed in said suit, and gave to Curtis an order upon the Bank of California to deliver the money and notes which had been deposited by him as aforesaid. On January 16th, the board of directors of the Silver Bell Copper Company met and adopted a resolution partitioning the proceeds of the sale to the Imperial Copper Company then in the treasury of the Silver Bell Copper Company between Steinfeld and the company. Under the terms of this partition Steinfeld received the sum of \$145,743.75 and one of the promissory notes for \$100,000.00 given by the Imperial Copper Company as the amount due him of the proceeds of the sale of the English group of mines, the title to which he held. There was present at this meeting Shelton, Curtis, Steinfeld and

Eugene S. Ives, the latter acting as the attorney of Steinfeld. On the 20th day of January, 1904, the directors of the company again met and passed a resolution declaring a dividend of \$111.00 per share of the capital stock of the Silver Bell Copper Company. Under this dividend the sum of \$33,300.00 was paid Steinfeld on the 300 shares standing in his name as trustee and which had been purchased from Nielsen.

The court in addition to these facts found that all the money paid out by Steinfeld in the purchase of the Francis-Volkert title and the English title to the English group of mines, and the \$2,000.00 paid in the purchase of the 300 shares of stock was the personal money of Steinfeld, and that at no time prior to the 20th day of May, 1903, did the Silver Bell Copper Company offer or agree to repay Steinfeld any of said money, or to assume any obligation which Steinfeld had incurred in the purchase of the Francis-Volkert title.

As we have stated, both parties have appealed from the judgment.

We will consider first Zeckendorf's appeal. His essential grievance is in the refusal of the trial court to grant any relief upon the cause of action set forth in his complaint based upon the claim that Steinfeld, at the time of the sale to the Imperial Copper Company, held the legal title to the English group of mines as the trustee of the Silver Bell Copper Company. Counsel for appellant, Zeckendorf, present two views of the case bearing upon this point. They urge first, that under the facts and circumstances surrounding the purchase of the English group of mines by Steinfeld, and from his expressed intention at the time, he should be held to be a trustee *ex maleficio* from the time of the purchase; they also urge that if he was not a trustee from the time of the purchase he became such under the agreement of May 20th, 1904, and the resolution of the directors of the Silver Bell Copper Company of that date, accepting his proffer to renew the option of July 15th, 1901. We will consider these in their order.

The law is that one may not purchase and hold, as his own, property which he is in duty bound to purchase and hold for another.

Wing vs. Dillon, 27 Miss. 494.

David vs. Hamlin, 108 Ill. 39.

Gardner vs. Ogden, 22 N. Y. 327.

This rule applies to officers and directors of a corporation as to other persons sustaining fiduciary relations to others. Whether in any case an officer of a corporation is in duty bound to purchase property for the corporation, or to refrain from purchasing property for himself, depends upon whether the corporation has an interest actual or in expectancy in the property or whether the purchase of the property by the officer or director may hinder or defeat the plans and purposes of the corporation in the carrying on or development of the legitimate business for which it was created.

Trice vs. Comstock, 121 Fed. 620.

We think the rule as thus stated is as broad as the authorities will sustain. Was Steinfeld in such relation to the Silver Bell Copper Company at the time of his purchase of the English group of mines as to have made it his duty either to purchase the same for the company or to refrain from purchasing it for himself? Steinfeld was not at the time a director of the Silver Bell Copper Company, yet, as found by the court, as managing partner of

879 L. Zeckendorf & Company, he dominated the affairs of the corporation through its board of directors. This being so he should be held doubtless to the same rule governing persons holding fiduciary or confidential relations to a corporation as though he were himself an officer or director. He obtained knowledge of the value of the English group of mines wholly by reason of his connection with the affairs of the company and largely from the reports of Curtis, the superintendent. In purchasing the property he had in mind what had previously been told him by Curtis to the effect that the acquisition of the English group and the joining of it with the company's property in case of sale would greatly add to the value of each. As against this view it should not be overlooked that at the time of the acquisition of the titles to the English group by Steinfeld the Silver Bell Copper Company was indebted to L. Zeckendorf & Company in an amount exceeding its capitalization, with no available resources which could be utilized to effect a purchase of the English group. Steinfeld did not prevent the company from making the purchase by any representation to the officers of the company or to the board of directors that he intended to and would obtain the property for the company. It is urged by counsel for appellant that he was in a situation to have

880 made the purchase on behalf of the company by personally advancing the money needed for that purpose, or by obtaining the same from the firm of L. Zeckendorf & Company. The answer to this is, that to hold that an officer or director of a corporation is under any duty to such corporation to loan money or to purchase out of his own funds property for the use of the corporation would be enlarging the duty of an officer or director of a corporation beyond any point to which the law of trust has ever gone. The same is true as to the suggestion that Steinfeld should have used the money of L. Zeckendorf & Company for that purpose; even had he authority under the terms of the partnership to use money for such purpose, he was certainly under no obligation to the corporation to do so.

It is further urged that Steinfeld's action, in causing the closing down of the Old Boot mine prior to his purchase of the English group, was unjustifiable, and an injury to the company, and was intended by him to make it easy to purchase the English group of mines and to affect the price for which the property could be bought. These arguments would be forceful if it could be determined from the facts that the closing down of the Old Boot mine prevented the corporation from obtaining the English group or in any way changed the relations of the corporation to the owners of the English group

881 as to hamper or impede the corporation in any plan or purpose it had in relation thereto; further, it is not apparent, either in the findings or elsewhere in the record, that the closing down of the Old Boot mine did, as a matter of fact, have any influence over the minds of the owners of the English group to induce them to sell to Steinfeld, or had any influence over the price for which they sold, even if we should regard either of these matters as bearing upon the duty of Steinfeld to the Silver Bell Copper Company in the matter of the purchase. Giving due weight to the facts connected with the purchase of the English group by Steinfeld, and the relations of Steinfeld to the company at the time, it cannot be said as a matter of law that Steinfeld in purchasing the property for himself violated any duty he owed to the Silver Bell Copper Company. It follows, therefore, that the finding of the trial court is in this regard fully sustained.

The court found that Steinfeld, before purchasing the English group of mines, had at different times written Zeckendorf, his partner, that it was very desirable that the English group should be purchased so that it could be joined with the Old Boot property and the whole sold as one group and one property, and that it was his intention to acquire the English group for this purpose. It must be remembered that the plaintiff, Zeckendorf, is here in the capacity of a stockholder of the Silver Bell Copper Company seeking relief on behalf of the company. We are, therefore, not concerned

882 with the question whether Steinfeld, in purchasing the property for himself, has violated any duty he owed to Zeckendorf as a member of the firm of L. Zeckendorf & Company. Steinfeld's expression of intention to Zeckendorf can have little bearing on the question under consideration, unless it should appear that his promise to purchase for the company was made or intended to be made to Zeckendorf as a stockholder of the company, and through him to affect in some way the subsequent conduct and relations of the corporation to the property, as by inducing the company to refrain from purchasing the property or from making any effort thereto; that it was so intended or did as a matter of fact have any such effect does not appear from anything in the record we have been able to discover. Certainly the findings do not so disclose. If Steinfeld had expressed an intention directly to the officers or directors of the Silver Bell Copper Company of purchasing for the benefit of the company, the English group, such an expressed intention would not have constituted Steinfeld a trustee *ex maleficio*, unless his failure to carry into effect this intention had so changed the relations or situation of the corporation to its disadvantage with respect to the property as would amount to constructive fraud.

Scribner vs. Meade, 85 Pac. 477.

883 Unless the corporation parted with something or lost or was deprived of something of value by virtue of such promise there was no fraud and Steinfeld was in the relation of a mere

unteer, free to carry out his expressed intent or not as he might thereafter choose.

Piedmont L. & I. Co. vs. Piedmont Foundry & M. Co. 11 So. 332.

Pearson vs. Pearson, 25 N. E. 342.

Stonehill vs. Schwartz, 28 N. E. 620.

We find no ground for the application of the doctrine of equitable estoppel to this case. It is true that the Silver Bell Copper Company went into possession of the English group after its purchase by Steinfeld and was given by the latter the right of working the same and mining any ores that might be taken from the same in the company's smelter. It is likewise true that maps and reports were made showing the English group as a part of the Silver Bell Copper Company's property, and that these maps and reports were made with the knowledge and acquiescence of Steinfeld for the purpose of effecting the sale of the entire property as a group. Under the settled rules governing the subject of equitable estoppel, before such estoppel could be predicated upon these circumstances it should appear that the corporation had been induced thereby to expend money on the property, which it otherwise would not have spent, or to incur some liability with respect thereto under the belief, entertained in good faith and occasioned by the conduct or statements of Steinfeld, that it was the equitable owner of the property. It does not appear that the Silver Bell Copper Company expended money on the English group of mines in excess of what it got out of the property under a belief that it was the equitable owner of the same, nor does it appear that it had borrowed money or increased its indebtedness or had become obligated to others in any way upon the credit of its beneficiary or equitable ownership of the English group. The assessment work upon the English group appears to have been done by the company under an agreement with Steinfeld, which was of no consideration for his extension of the option of July 15th, 1901. Under no view of the facts and of the law are we able to arrive at any different conclusion as to the nature of the title held by Steinfeld to the English group of mines prior to May 20th, 1904, than that reached by the trial court.

The facts found by the court show that the contract of May 20th, 1904, between the Silver Bell Copper Company and Steinfeld and the Mammoth Copper Company, in which Steinfeld's renewal of his option of July 15th, 1901, with certain modifications, was accepted, among other provisions, was rescinded by the stockholders of the company with the acquiescence of Steinfeld and the Mammoth Copper Company, on the 26th day of December, 1904. Upon the first hearing of this case we held that this rescission operated to put the parties where they were before the contract was made. As the option to take over the English group given by Steinfeld had never been exercised by the company prior to May 20th, 1904, and was only exercised then through said contract, the rescission of the latter left the parties as though the contract had never been entered into. On the record, therefore, there was no ac-

ceptance of Steinfeld's proffer, and the Silver Bell Copper Company did not become an equitable or legal owner of the English group under the option, and the trial court did not err in so holding.

Counsel for appellants urge, that without regard to the question of title to the English group, the plaintiff is entitled on behalf of the company to recover possession of the whole of the money paid over to Steinfeld, for the reason that the resolution of the board of directors, on January 16th, 1905, under which the money and note were paid over to Steinfeld, was voidable if not void at the suit of any party interested therein. The reason given why this resolution is at least voidable, is, that Steinfeld was at the time a director of the Silver Bell Copper Company and voted for the resolution, and that one, if not both, of the other directors was under his domination and control. Assuming the facts to be as thus urged, yet it does not fol-

886 low that the acts done under the resolution should be declared null and void, and the money paid over to Steinfeld be required to be again placed in the treasury of the company, unless there be some unfairness in the transaction apart from the circumstances under which the resolution was made.

Twin Lake Company vs. Marbury, 91 U. S. 587. Therefore, before Steinfeld should be required to pay back into the treasury of the company the money and note turned over to him, it should appear that he was either paid an undue amount, or that no distribution of the proceeds of the sale should, at the time, in fairness to the company, have been made. There is no showing that the amount paid Steinfeld under this resolution as his part of the proceeds of the sale due to him as the owner of the English group of mines was in excess of what he should have been paid, nor was it shown that the distribution was prematurely made. The pleadings do not raise this issue, on the contrary, by stipulation of counsel, all testimony which had been put in upon the first trial as to the relative values of the Old Boot and English group of mines was eliminated upon the grounds that the complaint proffered no issue as to such values.

We come now to the question raised by the appellees under their cross appeal and that is, was Steinfeld a trustee of the Silver Bell

887 Copper Company of the 300 shares of stock purchased from Nielsen? We think the facts fairly sustain the findings of the court that he was. The circumstances connected with the sale indicate that he bought the shares of stock for the company. The contract of purchase was in the name of Steinfeld and the Silver Bell Copper Company, and the agreement was that Nielsen was to be paid the sum of \$10,000.00 of the purchase price from the proceeds of the working of the Old Boot mine or from its sale. In addition to this the transfer of the stock was made from Nielsen to Steinfeld as trustee. Presumably, therefore, as the company was directly interested by the terms of the purchase in the sale, Steinfeld held as trustee for the corporation. The holding of the trial court that he was such trustee is thus abundantly sustained by the facts.

The action of the trial court in appointing a receiver under the

circumstances is not subject to just criticism. It appears that the Silver Bell Copper Company had ceased to do business and its affairs were ready to be closed. It is not contended that any different disposition of the money found to be due from Steinfeld should or would be made by the company than is to be made by the receiver, namely, its distribution among the stockholders of the Silver Bell Copper Company.

Counsel for appellant, Zeckendorf, complain of the amount allowed them by the trial court as attorneys for the plaintiff. As this was a matter within the sound discretion of the court and as we cannot say as a matter of law that this discretion was abused, we may not modify or change the judgment in this behalf.

The judgment is affirmed.

RICHARD E. SLOAN,
Associate Justice.

We concur:

EDWARD KENT, C. J.
FLETCHER M. DOAN, A. J.
FREDERICK S. NAVE, A. J.

And on the same day, to-wit: the twentieth day of March, 1909, being one of the regular juridical days of the January term of said Supreme Court of the Territory of Arizona, 1909, the following order and judgment, inter alia, was had and entered of record in said cause, in words and figures following, to-wit:

No. 1101.
LOUIS ZECKENDORF, Appellant,

vs.

ALBERT STEINFELD, R. K. SHELTON, SILVER BELL COPPER COMPANY, a Corporation, and Mammoth Copper Company, a Corporation, Appellees.

This cause having been heretofore submitted, and by the Court taken under advisement, and the Court having considered the same and being fully advised in the premises:

It is ordered, adjudged and decreed that the judgment of the District Court herein appealed from, be, and the same is hereby, affirmed.

It is further ordered, adjudged and decreed, that The Silver Bell Copper Company, a corporation, do have and recover of and from Albert Steinfeld, one of the appellants herein, and Epes Randolph and Leo Goldschmidt, sureties on the supersedeas bond herein, the amount of the judgment rendered in the trial court in favor of the defendant, the Silver Bell Copper Company.

It is further ordered, adjudged and decreed that Louis Zeckendorf do have and recover of and from Albert Steinfeld, one of the appellants herein, and Hugo J. Donau and L. Rosenstern, sureties on the cost bond herein, his costs in the court below in this cause incurred.

- 890 *Statement of Facts by the Supreme Court of the Territory of Arizona on the Second Appeal. Case No. 1101. Filed July 26, 1909.*

In the Supreme Court of the Territory of Arizona.

LOUIS ZECKENDORF, Appellant,
vs.
ALBERT STEINFELD et al., Appellees.

ALBERT STEINFELD et al., Appellants,
vs.
LOUIS ZECKENDORF, Appellee.

Cross-appeals.

The Supreme Court of the Territory of Arizona hereby adopts as a statement of facts, in the case on appeal, in the nature of a special verdict, the following:

The facts as found by the District Court in and for the County of Pima as follows:

891

Findings of Fact.

(Title of Cause.)

This cause came on regularly for trial before the Court, Honorable John H. Campbell, Judge thereof presiding, sitting without a jury (a jury having been theretofore regularly waived by all parties) on the 2nd day of January, 1908, all parties being present in person, and also by their attorneys: evidence oral and documentary having been regularly introduced and offered by the respective parties and received by the Court, the cause was in regular order and in due course and form argued to the Court, and submitted to it for its decision; after due consideration of the pleadings and of all admitted evidence in the case, and being fully advised in the premises the Court now finds the following facts in the case:

I.

That in the month of January, 1899, the Neilson Mining & Smelting Company, a corporation, was duly and regularly organized under and by virtue of the laws of the Territory of Arizona, with its principal place of business in the City of Tucson, County of Pima, said Territory; a true copy of its Articles of Incorporation and By Laws appear in the evidence as exhibits, pages 892 515 and 622, Abstract of Record. That on the 14th day of January, 1901, the name of said corporation was regularly and duly changed to the Silver Bell Copper Company. That said Silver Bell Copper Company is the defendant in the above entitled action and that at all

mes herein mentioned it has been and is now a corporation, duly organized, existing and doing business under and by virtue of the laws of the Territory of Arizona, with its principal place of business in the City of Tucson, said Territory. That at all the times mentioned in these findings subsequent to the 14th day of January, 1901, Albert Steinfeld, J. N. Curtis and R. K. Shelton, have been and now are the directors of said corporation, all of said parties being residents of the City of Tucson, County of Pima, Territory of Arizona. That plaintiff is now and for all the times herein mentioned has been a resident of the City of New York, State of New York.

That the said defendant, the Mammoth Copper Company, is now and for all of the times involved in this action has been a corporation organized and existing under and by virtue of the laws of the Territory of Arizona, having its principal place of business at Tucson, Pima County, said Territory. That the defendant, Albert Steinfeld, is now and for all of the times mentioned or involved herein, and ever since the organization of said corporation, has been the owner in fact of all of the capital stock of said Mammoth Copper Company and any stock standing in the name of any other party was placed in his name in order to enable such party to qualify as a director and was held by said party for that purpose alone, said stock at all times in fact belonging to and being the property of said Albert Steinfeld. That said Mammoth Copper Company at all times was but an instrument in the hands of the said defendant Albert Steinfeld, used by him for the purpose of transacting certain business for himself that he did not care to transact in his own name; that any money which may on its face have been paid to the defendant, Albert Steinfeld, and any property which may on its face have been delivered to the said Albert Steinfeld for said

94 Mammoth Copper Company, or for the benefit of the said Albert Steinfeld and the said Mammoth Copper Company, in fact and in truth were paid and delivered to the said Albert Steinfeld as his own individual property and were appropriated by him to his own individual use. That all acts and things done in the name of the said Mammoth Copper Company, and all things and property received, given or paid by or to or in the name of said Mammoth Copper Company, were in fact but acts, things and property done, received, given and paid by and to and for the benefit of the said Albert Steinfeld.

II.

That the ownership of the stock of said Nielson Mining & Smelting Company, or the Silver Bell Copper Company, at all times was as follows, viz: upon the organization of said Company, all of the stock of said Company was regularly issued to Carl Nielsen, in consideration of the transfer by said Carl Nielsen, to said Company of his rights in the hereinafter mentioned Old Boot or Mammoth mine, and of the transfer of certain personal property used in working said mine; that immediately thereafter, said stock was divided as follows: 499 shares to and in the name of L. Zeck-

endorf & Company; 30 shares in the name of Albert Steinfeld, Trustee, being held by him in trust for and as the property of William and Julia Zeckendorf; 170 shares in the name of and belonging to J. N. Curtis; 300 shares in the name of and belonging to Carl Nielson, and 1 share in the name of R. K. Shelton, but belonging to, and the property of L. Zeckendorf and Company; that in January, 1901, the 300 shares of said stock standing in the name of Carl Nielson were transferred on the books of the Company to the name of Albert Steinfeld, Trustee. That on the 6th day of June, 1903, the 499 shares standing in the name of L. Zeckendorf & Company were divided as follows: 250 shares thereof being issued to and in the name of L. Zeckendorf, the plaintiff in this action; 249 shares being issued to and in the name of Albert Steinfeld, said Albert Steinfeld taking unto himself the ownership of the one share still standing in the name of R. K. Shelton, the certificate therefor at all times after being issued being in the possession of said Albert

896 Steinfeld until December 9th, 1903, when, as hereinafter found, the same was given to said R. K. Shelton by the said Steinfeld, said R. K. Shelton then for the first time being put in possession of the certificate for said one share of stock; that the said R. K. Shelton never had any other or different interest in said Silver Bell Copper Company. That at all times and in all meetings of the stockholders of the said company said Albert Steinfeld voted all stock standing in his name as trustee or otherwise, and all stock standing in the name of L. Zeckendorf & Company; that L. Zeckendorf in person or by individual proxy never was at any stockholders' meeting of said company or voted any stock until the stockholders' meeting hereinafter mentioned, held on the 26th day of December, 1903. That at no time prior to June 6, 1903, was plaintiff a stockholder in the Nielsen Mining & Smelting Company or the Silver Bell Copper Company in his own right, but at all the times hereinbefore mentioned the stock issued to L. Zeckendorf & Company stood in the name of and was the property of the copartnership of L. Zeckendorf & Company, and was voted and controlled by Albert

897 Steinfeld as the managing partner of said copartnership, and the said L. Zeckendorf & Company had full and complete knowledge, through Albert Steinfeld, its managing partner, of all of the acts and things heretofore and hereafter found as having been done and performed prior to the 6th day of June, 1903.

III.

That defendant R. K. Shelton at all of the times involved in this action and ever since the incorporation of said Nielsen Mining & Smelting Company, or Silver Bell Copper Company, has been and is now but the representative of the said Albert Steinfeld on the Board of Directors of said Company, and at all times involved in this action voted as ordered, directed and requested by said Albert Steinfeld and not otherwise. That as Secretary of said corporation, said R. K. Shelton at all times did as ordered, directed and requested by said Albert Steinfeld. That for all the times subsequent to June

h, 1903, said J. N. Curtis as a director and other officer of the said Silver Bell Copper Company was under the complete domination and control of said Albert Steinfeld and as such director or other officer did whatsoever said Steinfeld requested or directed. At no time and under no circumstances subsequent to June 6th, 1903, did the said J. N. Curtis as director or other officer of the said corporation, do any act, take any step or cast any vote except as requested or directed by the said Albert Steinfeld. That Albert Steinfeld at all of the times involved in this action and mentioned in these findings was in fact in complete control of Nielsen Mining & Smelting Company and of said Silver Bell Copper Company, and in absolute control and direction of its business, property and affairs.

That the power of Albert Steinfeld over the Silver Bell Copper Company, and over the directors and officers thereof up to the month of June, 1903, arose out of the following facts and conditions, viz: the fact that said Company was heavily indebted to L. Zeckendorf & Company, and that L. Zeckendorf & Company and William and Julia Zeckendorf held a majority of the stock of the said company, said Albert Steinfeld as the managing partner of said L. Zeckendorf & Company having the power to control said indebtedness and to vote said stock of said L. Zeckendorf & Company and as trustee of William and Julia Zeckendorf having the power to vote said stock of William and Julia Zeckendorf, and the fact that on January 14, 1901, as trustee of the Silver Bell Copper Company the ownership of the 300 shares of stock purchased from the Nielsens, he assumed and was accorded by Curtis and Shelton the right and power of voting and did vote that stock.

IV.

That because of the facts herein found, it at all times would have been an idle and useless act for the plaintiff to make any demand whatsoever on the said Silver Bell Copper Company or on its Board of Directors or any of them to bring any action against the said Albert Steinfeld, the said J. N. Curtis or the said R. K. Shelton, particularly any action for the recovery of any property of said corporation, or any property claimed to belong to said corporation, or for the payment to said corporation of any debt owing by said parties or either of them, and particularly any action against the said Albert Steinfeld in favor of said corporation to recover any property or to redress any wrong done to said corporation by him, and for said reasons it would have been a useless and idle act for the plaintiff to have demanded of said Board of Directors that an action be brought by the said corporation against the said J. N. Curtis, R. K. Shelton and Albert Steinfeld, and if any such action had been brought by said corporation it would not have been prosecuted in good faith nor for a full recovery thereon, nor for the benefit of said corporation or this plaintiff as a stockholder thereof; and for such reasons and because of such facts and because it would have been an idle and purposeless act so to do, plaintiff made no de-

mand whatsoever on said corporation or on the Board of Directors thereof, that it bring this or any action against said defendants or that it prosecute the same, and plaintiff in bringing and prosecuting this action brought and prosecuted the same as a stockholder of said defendant Silver Bell Copper Company for its use and benefit and in order that its property illegally taken from it, as herein found, might be recovered and restored to its assets.

901

V.

That ever since the year 1878 this plaintiff and defendant Albert Steinfeld were partners, doing business in the City of Tucson, under the name of L. Zeckendorf & Company, under the terms and conditions of the articles of partnership and amendments thereto existing between them, which are in evidence and marked exhibits —.

Zeckendorf made visits from time to time to Tucson and upon such visits inspected the business of the copartnership and shared and directed in its conduct, and such was the condition at all times up to and including the commencement of this action; that plaintiff, at all said times, was a resident of the City of New York, State of New York, and said Albert Steinfeld was a resident of the City of Tucson, County of Pima, Territory of Arizona, and that during all of said times said Albert Steinfeld was the General Manager of the said business of L. Zeckendorf & Company and as such was in actual and active control of its business and its business affairs in said Territory, and employed and discharged all of its help and gave

902 and extended all credits and determines its business policy in all matters and things in said Territory of Arizona and in connection with its business therein. That plaintiff attended to and managed the business of said firm in New York, particularly the purchasing of the goods and merchandise handled by said firm.

That for some time prior to the 14th day of January, 1899, William and Julia Zeckendorf were the owners of what is known as the Mammoth, or the Old Boot Mine, being one of the mines hereinafter listed and mentioned; that the legal title to said mine stood in the name of Albert Steinfeld, he holding the same as trustee for said William and Julia Zeckendorf. That for some time prior to said 14th day of January, 1899, one Carl Nielsen had a working contract on said mine, executed by said Albert Steinfeld as the ostensible owner thereof, but for the real use and benefit of said William and Julia Zeckendorf, under and by virtue of which said Nielsen was to have the right to operate said mine and to take the ores therefrom and to pay to said Steinfeld, for the use and benefit of said William and Julia Zeckendorf, certain royalties on all ore extracted

903 from said mine. That during the operation of said mine, said Albert Steinfeld, as the manager of said L. Zeckendorf & Company, and in actual control of the business of said partnership, advanced and extended to said Carl Nielsen certain credits, and sold to him on credit large amounts of merchandise, resulting in said Carl Nielsen on and prior to the 14th day of January, 1899, becoming indebted to said L. Zeckendorf and Company in a large sum of money.

That defendant J. N. Curtis, during the time herein last above mentioned, was in the employ of L. Zeckendorf & Company, and in charge of its mines and mining properties, and at all said times took active personal charge of its mines and mining properties and attended to the direction of same and to the sales thereof; and received as his compensation for such work certain pay for his time and certain commissions on sales of mines that might be made by him, or through or under his influence or by his help and assistance.

That on or about the 14th day of January, 1899, in order to protect said indebtedness so owing to said L. Zeckendorf & Company by said Carl Nielsen, said Albert Steinfeld caused the Nielsen Mining & Smelting Company to be incorporated, under the laws of the Territory of Arizona. That thereafter William and Julia Zeckendorf, through the said Albert Steinfeld as trustee, gave an option to said Nielsen Mining & Smelting Company on the said Mammoth or Old Boot Mine, for an agreed price of twenty-five thousand (\$25,000) dollars, to be paid to said William and Julia Zeckendorf in installments of twenty-five hundred (\$2500) dollars each, to be paid each three months; said Carl Nielsen had previously thereto transferred to said Nielsen Mining & Smelting Company his working contract on said mine above mentioned and also transferred all personal property used on and in connection with said mine and the operation thereof, and said Nielsen Mining & Smelting Company assumed said indebtedness owing to said L. Zeckendorf & Company by said Nielsen, and the same was then charged on the books of said L. Zeckendorf & Company by and on the order and under the direction of said Albert Steinfeld, to the said Nielsen Mining & Smelting Company, and the same was thereafter carried on the books of L. Zeckendorf & Company in the name of Nielsen Mining & Smelting Company (until its name was changed to the Silver Bell Copper Company, and thereafter in such name), and at the same time L. Zeckendorf & Company released said Carl Nielsen from all personal obligation on said indebtedness; that thereupon the stock of the said Nielsen Mining & Smelting Company was divided as heretofore found, the 170 shares which were given to said J. N. Curtis were given to him by L. Zeckendorf & Company as compensation for his services in connection with said transfer and services to be performed by him for said Silver Bell Copper Company. That the directors of said company thereupon elected were said J. N. Curtis, Carl Nielsen and R. K. Shelton; that said Carl Nielsen was elected the nominal general manager and superintendent and J. N. Curtis the president and R. K. Shelton the secretary of said Company; but at all times thereafter, prior to June 6th, 1903, said Albert Steinfeld, as managing partner of L. Zeckendorf & Company, assumed to be the general manager of said company and assumed the power of directing its affairs and of controlling all of its actions, and said assumption of power on the part of the said Albert Steinfeld was assented to and acknowledged by the said J. N. Curtis, Carl Nielsen and R. K. Shelton, and L. Zeckendorf. That all matte, bullion and other mineral products obtained from the said mines, which were shipped or sold, were shipped or sold through the firm of

L. Zeckendorf & Company and the proceeds thereof received by said firm and credited by it upon the indebtedness to it of said corporation.

VI.

That said Nielsen Mining & Smelting Company, upon said transfers by Nielsen to it being complete and in January, 1899, entered upon the work of the development of said Mammoth or Old Boot Mine, said Carl Nielsen as superintendent being in actual charge thereof. That under said operation, large bodies of ore in said mine were developed and were found to extend within such a distance of the southern boundary line thereof, being the dividing line between said mine and the Prospector Mine, one of the mines belonging to the English group of mines hereinafter referred to, that it
907 became evident that said ore bodies then developed underneath the ground in said Mammoth Mine ran into said Prospector Mine, and other of said English group of mines, the said facts being ascertainable alone from an examination and inspection of the underground workings of said Mammoth or Old Boot Mine.

That in the year 1900 the said J. N. Curtis on the order and direction of said Albert Steinfeld took up in his own name other mines about and adjoining said Old Boot Mine, all for the use and benefit of said Nielsen Mining & Smelting Company, or Silver Bell Copper Company, and the same were carried by said J. N. Curtis thereafter in his own name, but as the property of and for the use and benefit of said Silver Bell Copper Company, said mines being included in the list of mines sold to the Imperial Copper Company as hereinafter found.

VII.

That during all the times herein mentioned those mines known as the English group of mines, being a part of the mines described in Finding XXII and specially so listed therein, surrounded said
908 properties of the Silver Bell Copper Company. That the beneficial ownership of said mines was in certain parties resident in England, from which fact the said mines came to be known as the English group of mines.

That one Francis and one Volkert claiming that said mines were open to location had filed locations on the same and were claiming title thereto; that this condition of ownership by said parties continued through the year 1899 and through the year 1900, up to the time of the purchase by Albert Steinfeld, hereinafter mentioned, of what is known as Francis & Volkert titles and the English title thereto. That the Francis & Volkert claims to said mines were initiated on or about the 1st day of January, 1900. That said Mammoth or Old Boot Mine, during the fall of the year 1899 and up to the time of the closing of said mine in the spring of 1900, was being worked at a substantial profit. That at said time said Nielsen Mining & Smelting Company was indebted to said firm of L. Zeckendorf & Company in an amount approximating thirty thousand dollars (\$30,000.00) over and above the value of all matte and bullion then on hand or in transit, for moneys which
909 had been advanced by said L. Zeckendorf & Company to said Nielsen Mining & Smelting Company, to enable it to develop

and open up said mine and to buy machinery, mills and other property necessary for the working of said mine and the handling of ores taken therefrom, and also for certain goods, wares and merchandise sold by said L. Zeckendorf & Company to said Nielson Mining & Smelting Company.

VIII.

That in the fall of 1899, said J. N. Curtis, the then President of said Nielsen Mining & Smelting Company, advised and informed said Albert Steinfeld that the developments of said Mammoth Mine showed that the ore bodies therein, (the same being underground and undeveloped and, except as thus shown, unknown) would run into said Prospector Mine and other mines belonging to said English group of mines, and that said underground workings of said Mammoth Mine showed that there were probably great values in said English group of mines: That at about the same time said Albert

Steinfeld became dissatisfied with the management of said
10 Carl Nielsen and with his work as superintendent and general manager of said mine; and thereupon and in the month of December, 1899, said Albert Steinfeld, without action of or authority from the Board of Directors of said Company, assumed to and did discharge said Carl Nielsen as general manager and superintendent of said mine, notwithstanding that he had been elected by the Board of Directors of said Company; and at the same time ordered said Mammoth Mine to be closed down and all work therein to be stopped, as soon as the coke and ore on hand should be used up. His controlling purpose in so doing being to obtain from Nielsen for the corporation the ownership of the said 300 shares of stock then owned and held by him, and in order that the English group of mines, so-called, and the Francis-Volkert titles thereto might be purchased at a nominal or small sum, without the owners thereof obtaining knowledge through the workings of said Mammoth Mine and the showing of ore bodies therein, that said ore bodies probably did and would extend into said English group of mines; and said
11 mine was not shut down because said mine could not have been worked at a profit, for the same could have been worked at a substantial profit; and that all of the said acts and purposes of said Steinfeld were communicated by him to the said L. Zeckendorf at the time the said acts were done or the said purposes formed.

IX.

That said J. N. Curtis as the President of said Nielsen Mining & Smelting Company, prior to said time, had frequently advised and notified said Albert Steinfeld, and said Albert Steinfeld at all times had known, and said Zeckendorf had been told and informed by said Steinfeld that it was very desirable that said English group of mines, so-called, should be purchased, in order that all of the mines and mining claims surrounding said Mammoth Mine should with constitute one group, and in order that the whole thereof might be sold as one group and one property, as any intending purchaser would, upon examination of said Mammoth Mine, soon ascertain

that the ore bodies therein probably extended into said English group of mines; and because of the fact that all purchasers of large
912 mining properties desire to control all claims immediately surrounding any developed mine or mines.

That said Albert Steinfeld, before ordering said mine to be closed, and work thereon to be stopped, visited said mine and examined the same, and ascertained and learned the truth of the statements so made to him by said J. N. Curtis, both as to the ore bodies in said mines and their tendencies as above found and also as to the necessity of acquiring title to said English mines, so that all of said mines and mining properties described in said Finding XXII could or might be sold as one group and one property. That said Albert Steinfeld acquired said information because of the fact that he was acknowledged and conceded to be the actual manager of said Nielsen Mining & Smelting Company, and because of his assumption of such power and of such position, and that he acquired said knowledge and information solely from said J. N. Curtis, the President of the Nielsen Mining & Smelting Company, and from a personal examination of said mine made by him as such assumed and acknowledged actual manager of said company. That said Nielsen
913 being discharged as said superintendent and manager, the personal control of said mine was then, by direction of said Steinfeld, placed in said J. N. Curtis, as the President of said Nielsen Mining & Smelting Company.

X.

That under date of the 16th day of May, 1900, said Steinfeld entered into an agreement in writing with the said Francis and Volkert, said agreement being hereafter set out in full in Finding XVII attached to and as a part of the July 15, 1901, proposal or option. (Ex. 137.)

That thereafter and in pursuance of said agreement the interest of said infant children was conveyed to said Mammoth Copper Company for said Steinfeld, and he paid the said sum of \$625 therefor; that the said sum of \$1,875 and \$625 so paid by said Steinfeld, were the personal money of said Steinfeld.

XI.

That on or about the 29th day of June, 1900, said Albert Steinfeld purchased from the said Carl Nielsen the said three hundred (300) shares of stock belonging to said Carl Nielsen,
914 and purchased from said Carl Nielsen and one Lewis two certain mines they had and all mines and mining claims that said Carl Nielsen might have in the mining district in which were located said Mammoth, or Old Boot Mine, said mining district being known as the Silver Bell Mining District. That the purchase price paid and agreed to be paid for said two mines and mining properties and said three hundred shares of stock was the sum of two thousand (\$2,000) dollars cash then paid, and the sum of ten thousand (\$10,000) dollars; agreed to be paid out of the proceeds of the working

of said Old Boot or Mammoth Mine, or the proceeds of the sale of said mine, in the event the same should be sold before said sum should be paid out of the proceeds derived from the working of said mine: That said contract, on the direction of the said Albert Steinfeld, was signed by himself individually and by said Nielsen Mining & Smelting Company. That said sum of ten thousand (\$10,000.00) dollars on January 24, 1904, was paid by said Steinfeld, to Mary Nielsen, the successor of Carl Nielsen, and one of the parties to said contract: That said Albert Steinfeld took said 300 shares of stock in his name as "trustee" and all times after January 19th, 1901, held said stock in his name as such trustee, but for the Silver Bell Copper Company said Silver Bell Copper Company during all such times and now being the equitable and real owner thereof.

XII.

That said Albert Steinfeld, after closing down said mine and after purchasing said Nielsen stock and interests and mines and said Francis and Volkert interests, proceeded in September, 1900, to England and there concluded the purchase of the English titles to said English group of mines, including the purchase of the equitable, as well as the legal, title thereto, paying therefor the sum of five thousand (\$5,000.00) dollars. That said sum of \$5,000 (five thousand) so paid for said English group of mines, and said sum of twenty-five hundred (\$2,500.00) dollars paid to said Francis and Volkert, were amounts very much less than said mines could probably have been purchased for, if the owners of said English titles to said group of mines and said Francis and Volkert titles thereto, or either, had become possessed of the knowledge which said Albert Steinfeld had acquired, as hereinabove found, of the tendency of the ore bodies in said Mammoth or Old Boot Mine.

XIII.

The said Steinfeld in purchasing the said English group of mines from the said Francis and Volkert and from the said English owners did not purchase the same with the then intent that thereby they should become and be the properties of the Silver Bell Copper Company but at the times of the said purchases the said Steinfeld intended to take the properties as his own, but with purpose to offer to the said Silver Bell Copper Company an opportunity to take said mines and said properties upon the said Silver Bell Copper Company reimbursing him for the outlays and expenditures which he would have and had been put to in acquiring the same, and said Steinfeld expected that the said Silver Bell Copper Company would take over the said properties, the said Steinfeld intending on his part that in the event the said corporation did not take over the said properties and so reimburse him he would keep said properties for and as his own.

XIV.

That after acquiring said Francis and Volkert titles to said mines, and prior to his going to Europe, said Albert Steinfeld directed that the said Mammoth or Old Boot Mine be again put in operation and again worked, and thereupon and thereafter it and the adjoining mines as one property were worked and operated by said Silver Bell Copper Company. That by the time said mine was reopened the price of copper had so depreciated that the profits that could be derived from the workings of said Old Boot Mine and adjoining mines were very much less than at the time said Old Boot mine was closed down by Steinfeld in the spring of 1900 as above found.

That in January, 1900, said Steinfeld caused the development work upon said mine to be stopped; the smelter, however, was run until some time in February, 1900, at which time all the coke and supplies necessary for the operation of the smelter and sub-
918 stantially all the ore which had been developed prior thereto, were exhausted, and that if said development had not been stopped by said Steinfeld but had been continued during the operation of said smelter, sufficient ore would have been developed to have kept the smelter continuously supplied, and in consequence thereof said Silver Bell Copper Company sustained great damage.

XV.

That in the early part of 1901, the question as to the ownership of the 300 shares of stock purchased from Nielsen by Steinfeld and of the English group of mines arose between Steinfeld and Curtis as president of the Silver Bell Copper Company, Steinfeld claiming the absolute ownership of both the shares of stock and of the mines, and Curtis claiming that Steinfeld held the same in trust for the company. Curtis thereupon consulted S. M. Franklin, the company's attorney, and was advised by Franklin that Steinfeld held both the stock and the mines as the trustee for the corporation, and Steinfeld was so advised. That upon receiving this advice
919 Steinfeld demanded of Curtis that interest be paid to him by the company on the sums of money expended by him in the purchase of stock and of the mines, as is evidenced by a letter written by said Steinfeld to Curtis, dated May 19, 1901. Curtis, as the treasurer of the company, signed checks for such interest and sent them to Steinfeld. After the receipt of such checks by Steinfeld he consulted with said Franklin as to his rights; he was advised by Franklin that because of his relations with the company, he had no legal right to make the purchases for his own benefit; but, on the other hand had no right to compel the company to assume such purchases; that it was his duty to give to the company an opportunity at a meeting of the stockholders at which L. Zeckendorf should vote the L. Zeckendorf & Co. shares within a reasonable time to reimburse him for his outlays, and to take over the property if he so desired; and that if the company should not avail itself of his offer, Steinfeld could then hold the properties as his own. After receiving said advice Steinfeld returned the checks for the interest to Cur-
tis.

920

XVI.

That in the year 1900, immediately upon acquiring said two mines from said Nielsen and Lewis and the said English group of mines, said Steinfeld, as the same were acquired, turned same over to the possession of the said Nielsen Mining & Smelting Company, and said Nielsen Mining and Smelting Company thereupon assumed the possession and control thereof.

That said J. N. Curtis, as president of said Silver Bell Copper Company, upon and after said mines were turned over as aforesaid to said Silver Bell Copper Company from time to time prepared various maps for and under the direction of said Albert Steinfeld, showing all of said mines named in Finding XXII as one property and one entire group of mines, and as the mines and properties of said Silver Bell Copper Company; and said J. N. Curtis, as president of said Silver Bell Copper Company, on the direction of said Albert Steinfeld, from time to time prepared various reports of "all of the properties of said Silver Bell Copper Company" and included in said reports all mines mentioned in Finding XXII without in any manner segregating or separating the same into groups, and as being properties of said Silver Bell Copper Company.

XVII.

That under date of July 15th, 1901, in order to bring the matter of the purchase of the properties hereinbefore referred to formally before the stockholders of the company for action, said Albert Steinfeld delivered to the secretary of said Silver Bell Copper Company a document or proposal dated of said date in the words and figures following, viz:

"TUCSON, ARIZ., July 15th, 1901.

Silver Bell Copper Company (Formerly Nielsen Mining and Smelting Company), Tucson, Arizona.

GENTLEMEN: On May 16th, 1900, I entered into a contract with Margaret Francis and Julius Volkert in regard to certain mining claims and mill sites situated in the Silver Bell Mining district, Pima County, Arizona, claimed by them and which are situated either adjoining or near to the Mammoth mine, or better known as the Old Boot mine, which is being operated by your company, a copy of which agreement is hereto annexed.

In pursuance of this contract I have caused to be conveyed to the Mammoth Copper Company, the corporation mentioned in the agreement, all the interest of the said Margaret Francis and Julius Volkert as well as the interest of the minor heirs of John Francis, deceased, and in consideration therefor, I have received the following, to-wit:

1. Nine hundred and ninety-seven shares of the full paid up and non-assessable stock of the said Mammoth Copper Company, being all the shares of the capital stock of that corporation, except the three shares held by its directors.

2. The promissory note of said corporation dated June 8th, 1900, payable to my order one year from date for the sum of \$2,780, with interest thereon from its date until paid at one per cent per month.

923 3. The promissory note of said corporation, dated June 8th, 1900, payable to my order or demand, for \$12,500 with interest from demand at the rate of one per cent per month.

4. A mortgage executed by said corporation on all said mining claims and mill sites, as security for the payment of said two promissory notes.

5. The written agreement of said corporation, dated June 8th, 1900, wherein it agrees to do and perform all the matters and things by me agreed to be done and performed in the said contract of date May 16th, 1900, a copy of which agreement of date June 8th, 1900, is hereto annexed.

The first mentioned promissory note being for the payment of the sum of \$2,780.00, represents the actual amount of money paid by me to Margaret Francis, individually and as guardian for her children, and to Julius Volkert for their deeds to the mining claims and mill sites mentioned in their agreement, to-wit: \$2,500.00 for the deeds and \$280 or thereabouts for legal and other expenses in connection therewith.

924 The other promissory note being for \$12,500, is held by me as security for the payment of said Mammoth Copper Company of the sum of \$12,500 provided to be paid to said Francis and Volkert when said mines are sold in accordance with the agreement of May 16, 1900, and as security for the faithful performance on the part of said company of their agreement to me of date June 8th, 1900.

I herewith submit for your inspection the originals of said agreements, notes, mortgages and deeds.

2.

Certain of the mining claims mentioned in the agreement of May 16, 1900, were claimed under different locations by the other claimants, and by the terms of that agreement I was obligated either to acquire such adverse locations and claims by purchase, or to litigate the same.

In order to fulfill the obligations imposed upon me in this regard, it became necessary for me to go to England to see some of the adverse claimants. This I did in the summer of 1900. After
925 considerable negotiations I obtained the deed on the English claimants, Frederick Clark Beckwith, and the Tucson Mining and Smelting Company, Limited, a British corporation, and also of Herbert B. Tenny of Tucson, which deed was dated August 21st, 1900, and conveyed to me the following mining claims situate in said Silver Bell Mining district, to-wit: Page, Southern Beauty, Silver Bell, Confidence, Union, Emerald, Comet, Prospector, Florence, Imperial and Yankee.

The amount of costs and expenses by me in the negotiation and in acquiring said deed was as follows:

Purchase price, \$5,815.63.

The expense of trip, attorneys' fees and incidentals, \$2,668.51, all of which sums were expended by me on or about August 21st, 1900.

I now hold in my own name all the mining claims so conveyed to me by such deed.

3.

On June 29th, 1900, I obtained from Carl Nielsen, Mary Nielson, his wife, and L. B. Lewis, their deed conveying to me the
926 Clarence mining claim, situate in said Silver Bell mining district, and also, "all their right, title and interest in and to all mining claims, mill sites and property situate in said Silver Bell mining district, the legal or equitable or record title to which is now in either the Nielsen Mining and Smelting Company, a corporation or in the Mammoth Copper Company, a corporation, or in the Tucson Mining and Smelting Company, a corporation, or in Frederick Clark Beckwith, or in Julius Volkert or John Francis, or in the heirs, distributees or estate of said John Francis, deceased, or in J. N. Curtis, or in Herbert B. Tenny, or in said Albert Steinfeld." This deed is of record in the office of the county recorder of Pima County, in Book 22, of Deeds to Mines, on pages 508 and 509, reference to which is hereby made.

For this deed I paid to the grantors on the 3rd day of July, 1900, the sum of \$2,000 and I now hold in my own name, all the mining claims so conveyed to me.

In this connection, I will further state that on June 29th, 1900, the Nielsen Mining and Smelting Company, by J. N. Curtis,
927 its president, and myself, as parties of the first part, and Mary Nielsen and Carl Nielsen as parties of the second part, entered into an agreement, the original of which is in possession of yourselves. At the time of the execution of this agreement I personally paid to said Nielsens out of my own money, the sum of \$2,000, which was in payment of the quit-claim deed executed to me by them and Lewis, above referred to; and it was at the same time agreed by Mr. J. N. Curtis, your president and myself, that the three hundred shares of stock assigned to me by the Nielsens should be held by me in trust until the purchase price thereof, to-wit: Ten thousand dollars was paid by the Nielsen Mining & Smelting Company, as per the agreement, when said shares should be assigned by me to your company.

4.

I am of the opinion that all of the mining claims and mill sites and property acquired, as above set forth, by the Mammoth Mining Company and by myself, are of great value to you, and that your company should own the same, and as an inducement to you to
928 purchase and acquire the same, I am willing to place you in my shoes, that is to say, to sell and convey to you all the interest so acquired by me, upon my being repaid the amounts of money I have expended, with interest, and upon your assuming and guaranteeing with security satisfactory to me the performance

on your part, of all the matters and things and payments which under the various contracts I am liable or responsible for. To this end I herewith submit to you the following proposition:

5.

Proposition.

If you will repay to me, on or before the 15th day of October, 1901, the sums of money I have expended and expenses incurred, as above set forth, with interest thereon from the dates of such respective expenditures up to the 15th day of October, 1901, at the rate of 1 per cent per month, and aggregating the total sum of fifteen thousand, one hundred and ninety-two dollars and forty-five cents, being the aggregate of the following items, to-wit:

June 8th, 1900, paid Francis and Volkert and expenses, \$2,780.00.

929 Interest on above \$451.75; total \$3,231.75.

August 21, 1900, paid for deed Beckwith, Tucson Mining and Smelting Company, Limited, and Tenney, and expenses, trip to Europe to obtain same, and other expenses connected therewith \$8,484.14.

Interest on same to October 15th, \$1,166.56.

June 29, 1900, paid to the Nielsens and Lewis for their deed, and expenses connected therewith, \$2,000.

Interest on same to October 15th, \$310; total, \$15,192.45 and if you will on or before the said 15th day of October, 1901, and at the same time that the said repayment is made to me, duly agree in writing to do and perform the annual assessment work required to be done on all mining claims, and pay or repay for the annual assessment work required to be done thereon for the year 1900 and 1901, and further agree to assume and perform all the matters and things agreed to be done by me, or assumed by me in my said agreement with said Margaret Francis and Julius Volkert of date May

16, 1900, and further save and keep me harmless from any
930 loss or expense by reason of my having entered into said agreement:

Then I will agree as follows:

First. Immediately to cancel as paid said note for \$2,780, executed to me by said Mammoth Copper Company, and thus extinguish said obligation.

Second. To hold all of said 997 shares of the capital stock of said Mammoth Copper Company, and to hold the \$12,500 promissory note and mortgage executed by said company, and to hold all the mining claims and mill sites conveyed to me by said Frederick Clark Beckwick, Tucson Mining and Smelting Company, Limited, and Herbert B. Tenney, by their deeds dated August 21, 1900; and the mining claims and the mill sites conveyed to me by said Carl Nielsen, Mary Nielsen, his wife, and L. B. Lewis; and to hold the 300 shares of the capital stock of the Nielsen Mining & Smelting Company (now the Silver Bell Copper Company) as trustee for your company, subject to the following trusts and conditions, to-wit:

31 1. That upon your complying and performing the matters and things by you agreed to be done and performed according to the terms of the written agreement which hereinabove provided you shall execute to me, that is to say, upon your doing all the matters and things by me agreed to be done and performed under my agreement with said Francis and Volkert of date May 6th, 1900, and upon your paying to them or their assigns the sum of \$12,500 as in said agreement is provided, or procuring their release from said payment; and also paying to said Carl Nielsen and Mary Nielsen, his, her or their assigns, or personal representatives, the sum of ten thousand dollars as agreed to be done by our joint agreement with them of date June 29th, 1900; then and in such event I will transfer and assign to you absolutely all of said shares of stock, both said 997 shares of stock of the Mammoth Copper Company and the 300 shares of the Nielsen Mining and Smelting Company; and I will cancel their promissory note for \$12,500 and satisfy on record the said mortgage given as security therefor; and I will convey to you absolutely all the right, title and interest acquired by me under the said deed executed to me by said Beckwith,

32 Tucson Mining and Smelting Company, Limited, and Tenney and under the deed executed to me by Mary Nielsen, Carl Nielsen and L. B. Lewis.

2. That in the event you fail to carry out your said agreement with me to do and pay for the annual assessment work upon said mining claims, or to make either said payment of \$12,500 or said payment of \$10,000, respectively, as above provided or to do any of the other matters or things by you agreed to be done and performed under the terms of the written agreement which you are to execute to me, as aforesaid, then and in such event you are to forfeit to me the moneys which you are to pay me, as aforesaid, and I am to be freed from said trust, and am to hold all of said shares of stock, promissory note, mortgage, mining claims, and mill sites described in said deed to me, absolutely in my own right, and free from any trust whatsoever, and you are to have no interest of any nature whatsoever, equitable or otherwise, thereto or therein.

I hereby give you until the 15th day of October, 1901, to

33 accept this proposition and to pay me the said sum of \$15,192.45 to me, and to execute the written agreement above provided for; it being distinctly understood that if you fail to pay me said sum of \$15,192.45 and execute said agreement to me on or before said 15th day of October, 1901, then this proposition and option to you is ended and in that event I shall hold all said shares of stock in the Mammoth Copper Company, and all said mining claims aforesaid, individually and for my own benefit. The 300 shares of stock in the Nielsen Mining and Smelting Company (now the Silver Bell Copper Company), however, I will in any event continue to hold under our joint agreement with the Niensens in regard thereto, unless you wish to disaffirm the said agreement made by your president in regard thereto.

Yours truly,

ALBERT STEINFELD."

That attached and made a part of said document were the following contracts, viz: The contract known as the Nielsen
934 agreement and described in the evidence herein and set out in full being Exhibit No. 44. And the contract contained in the evidence herein and known as the Francis and Volkert agreement, attached to and being the latter part of Exhibit No. 137.

That said document had been prepared by S. M. Franklin, the attorney for said Silver Bell Copper Company, for the purpose of bringing the question of said Steinfeld's actions in purchasing said mines and properties before the stockholders of said company; but in making and in presenting the said proposition the said Steinfeld was not influenced by the advice given him by said Franklin concerning his relations and duties to the said company.

That said document was presented to the Board of Directors of said company on the 15th day of July, 1901, at which the said proposition was ordered filed; and at which meeting it was resolved that a meeting of the stockholders should be called to decide whether said proposition should be accepted or rejected. That no such meeting, as above found, was called or held.

That on October 1, 1901, a meeting of the directors of said
935 company, namely, Steinfeld, Shelton and Curtis, was held, at which the following took place:

"Mr. Albert Steinfeld stated he would agree, in consideration of this company performing and paying for the assessment work done and to be done, for the years 1900, 1901, and 1902, upon all of the mining claims mentioned and described in his communication to this company of date July 15th, 1901, to extend the time within which this company has the right to accept his said proposition and to pay the amounts of money required by it to be paid if the proposition is accepted, from October 15th, 1901, the date mentioned in said communication, until the 15th day of September, 1902; provided, however, that upon said 15th day of September, 1902, this company not only pay to him the amount of money called for in said communication, to-wit: \$15,192.45, but also to pay him the interest from October 15th, 1901, until the 15th day of September, 1902, at the same rate as is set forth in said communication.

On motion duly seconded it was unanimously resolved that the foregoing proposition of Mr. Steinfeld be accepted and that
936 the president of this company be and he is hereby authorized to do, perform and pay for the annual assessment work for the years 1900, 1901, and 1902, upon the mining claims mentioned in the communication of Mr. Albert Steinfeld of date July 15th, 1901, and further

Resolved, That the meeting of the stockholders authorized and directed by the resolution of this board heretofore adopted, to be called by the president for the purpose of considering the proposition of Mr. Steinfeld on date of July 15th, 1901, be called by him on a day not later than the 15th day of September, 1902."

That a stockholders' meeting was thereafter held on said October 1st, 1901. L. Zeckendorf was not then in Tucson. No action what-

ever with reference to said proposition was taken and no such meeting as that so ordered to be called was ever called or held. That the matter of the acceptance or rejection of said offer did not again come before either the directors or stockholders of said company and no corporate action was taken thereon until the meeting of the directors held under date of May 20th, 1903, hereinafter found and set out. That at all times after July 15, 1901, the Silver Bell Copper Company continued, as it had since November, 1900, to possess, work and use, and do the assessment work on all said properties as its own and as one property and with the full knowledge and consent of Albert Steinfeld and the Mammoth Copper Company.

XVIII.

That neither said Albert Steinfeld nor said Mammoth Copper Company at any time after July 15, 1901, made or asserted any claim to or right in any of said mines or property, except such as are recited in the minutes of the meetings of the directors of the Silver Bell Copper Company.

That plaintiff knew nothing of said proposal or of the facts concerning the purchase of said mines, properties or stock, and of the prices paid therefor, or of the circumstances surrounding the same until long after May 20th, 1903, except that plaintiff knew that said Steinfeld had, during the year 1899, and the early part of the year 1900 reported to plaintiff that the purchase of the same was desirable and should be accomplished and that said Steinfeld intended for the company to acquire the same, and further that when said Steinfeld returned from Europe after concluding the purchase of the English titles to said English group of mines, he advised and told plaintiff that he had purchased the same.

XIX.

That in the month of March, 1901, said Albert Steinfeld called upon said J. N. Curtis to prepare a written report of "the mines and mining properties of the Silver Bell Copper Company," and that on the 24th day of March, 1901, pursuant to said request, said J. N. Curtis, as the president of said Silver Bell Copper Company, delivered to said Albert Steinfeld a written report and statement, particularly describing the properties of the Silver Bell Copper Company, in which written report he, the said J. N. Curtis, included by description as the property of the Silver Bell Copper Company, all of the said English group of mines and other mines mentioned in Finding XXII, but without in any manner segregating or grouping the same; that said Albert Steinfeld, in said month of March and in the month of April, 1901, circulated said written report and delivered copies thereof to various and different people and, over his signature, to this plaintiff as being a correct report of the mines and mining properties belonging to said Silver Bell Copper Company; and that thereafter and at various and different times said Albert Steinfeld furnished to this

plaintiff written reports over his signature of the properties belonging to said Silver Bell Copper Company.

That Albert Steinfeld did not at any time prior to the purchase from the English owners of their title to the English group of mines make any direct or express promise or representation to the Nielsen Mining and Smelting Company or the Silver Bell Copper Company or to any officer or director of said company that he would purchase as agent or representative of said company or otherwise, the Francis and Volkert titles to the English group of mines or the title of the English owners to the English group of mines for the use or benefit of the said company.

940

XX.

On April 3, 1903, said Albert Steinfeld wrote a certain letter to one G. A. Beaton, giving him an option upon and, whereby he agreed that he would convey or cause to be conveyed for the sum of \$515,000 all of the said properties as one entire property, including therein all mines and properties standing in the name of J. N. Curtis, Albert Steinfeld and of said Mammoth Copper Company in said Silver Bell mining district, which, in addition to the mines standing in the name of said Silver Bell Copper Company would include the mines standing in the name of said J. N. Curtis, and the said English group of mines standing in the name of said Albert Steinfeld and said Mammoth Copper Company and said two mines so purchased from said Nielsen & Lewis standing in the name of said Albert Steinfeld. That at the time said price of \$515,000 was fixed for said entire properties said Steinfeld intended to renew and permit the corporation to accept the terms of the proposition dated July 15, 1901 as extended on October 1st, 1901, and the officers of said Silver Bell Copper

Company expected the corporation to avail itself of said offer
941 so that the whole of said price would be paid to and become the property of said Silver Bell Copper Company. That on the 13th day of May, 1903, said Albert Steinfeld formally reported to the board of directors of said Silver Bell Copper Company in session, that he had made or given on behalf of himself and the Mammoth Copper Company and of the Silver Bell Copper Company a written option to George A. Beaton of New York City and his assigns, for the sale amongst other things of all the property rights, interests and assets of the said Silver Bell corporation; and requested that his action in so doing be confirmed, and thereupon and upon such request, he voting therefor his action in giving said option for said purchase price was confirmed. That the option to said Beaton was taken by him for the Imperial Copper Company and the sale thereafter consummated to the Imperial Copper Co. to all of the properties described in Finding XXII was, under and by virtue of said option and for the purchase price of \$515,000 named therein.

XXI.

That negotiations for and concerning said sale were continuous from the time of the giving of said option to said Beaton down to and including the 20th day of May, 1903. That said Albert Steinfeld personally conducted said negotiations, by and on behalf of said Silver Bell Copper Company, with said Imperial Copper Company and said Beaton and the attorneys of said Imperial Copper Company, and caused S. M. Franklin, his personal attorney and the attorney for said Silver Bell Copper Company to take part in said negotiations and to assist in the preparation of all contracts and papers, and to do other work in connection with said sale, said S. M. Franklin during all said negotiations acting as the attorney for said Silver Bell Copper Company, on the direction of said Steinfeld.

XXII.

That said sale was consummated on May 20, 1903, and the mines and mining properties sold to the Imperial Copper Company on the 20th day of May, 1903, were the following:

943 Mammoth or Old Boot, Copper, Herbert, Confidence, Accident, Black Daisy, Black Eagle, Imperial, Pima, John F. Murray, Apache, Belle, Emerald, Papago, Pope, Prospector, Omaha, Leslie, Hamilton, Baltimore, Maggie, Silver Bell, Swansea, Spike, Florence, Detroit, Billy, Southern Beauty, Sampson, Frank B., Union, Hilda, Wedge, Comet, Millionaire, Alliance, Page, Trudie, Northern, Yankee, Olympia, Strip, Mollie, El Paso, Fraction, Anita, Queen, and Enterprise;

That of said mines, the following named mines were those which were known as the English group of mines, namely:

Herbert, Confidence, Black Daisy, Black Eagle, Imperial, Pima, John F., Murray, Apache, Belle, Emerald, Papago, Pope, Prospector, Omaha, Leslie, Hamilton, Baltimore, Maggie, Silver Bell, Swansea, Spike, Florence, Detroit, Billy, Southern Beauty, Sampson, Frank B., Union, Hilda, Wedge, Comet, Millionaire, Alliance, Page, Trudie, Northern, Yankee, Olympia, Strip, Mollie, El Paso, Fraction, Anita, Queen, Enterprise.

XXIII.

944 That pending said negotiations the representatives of the Imperial Copper Company demanded as a condition to the carrying out of said sale that Albert Steinfeld and the Silver Bell Copper Company should guarantee the titles to said properties and that said Steinfeld did, in pursuance of said demand and insistence of said representatives of the Imperial Copper Company, sign and cause the said Silver Bell Copper Company to sign a document, being defendants' "Exhibit K K."

XXIV.

That under date of 20th day of May, 1903, all of the properties listed and described in the schedule "Exhibit A" attached to plain-

tiff's complaint and amended complaint on file herein, were sold to the Imperial Copper Company for the purchase price of \$515,000.00. That the Silver Bell Copper Company, Albert Steinfeld and the Mammoth Copper Company joined in the deed of conveyance of said properties: That said purchase price of \$515,000.00 under the terms of the sale thereof, became payable as follows, to-wit: \$115,000.00 in cash on said 20th day of May, 1903, and \$400,000 in four equal payments of \$100,000 each, due respectively in three, six, nine and twelve months after said 20th day of May, 1903, each of

945 said payments being represented by a promissory note executed by the Imperial Copper Company for \$100,000.00 principal, to the order of, and payable to the said Silver Bell Copper Company, each of said notes being dated the said 20th day of May, 1903, and bearing interest from said date of payment thereof, at the rate of six (6) per cent. per annum; that the sum of \$115,000.00 in cash was paid by said Imperial Copper Company to and received by said Albert Steinfeld, as the treasurer of the said Silver Bell Copper Company; that the said four promissory notes, each for \$100,000.00 principal, as aforesaid, were delivered to and received by the said Albert Steinfeld, as treasurer of the said Silver Bell Copper Company, and said cash and notes were to be held by said Steinfeld pursuant to the agreement of May 20, 1903, in the next finding set forth.

XXV.

That on the said 20th day of May, 1903, after the said sale was completed, the said Silver Bell Copper Company, Albert Steinfeld and the Mammoth Copper Company, executed an agreement

946 in writing, in the words and figures following, to-wit:

"This agreement made this 20th day of May, 1903, between the Silver Bell Copper Company, a corporation organized and existing under the laws of the Territory of Arizona, party of the first part, and the Mammoth Copper Company, a corporation organized and existing under the laws of the Territory of Arizona, party of the second part, and Albert Steinfeld, of Tucson, party of the third part, witnesseth:

"Whereas, the parties hereto have this day agreed to sell certain mining claims and property to the Imperial Copper Company, a corporation, as per written agreements heretofore made, and deeds for which property are now in escrow with the Phoenix National Bank, of Phoenix, Ariz., and

"Whereas, the parties hereto desire to settle and determine as between themselves, what disposition shall be made of the proceeds of said sale; and

"Whereas, the said Albert Steinfeld has assumed certain

947 obligations with the said Imperial Copper Company, as more fully appears in the various agreements heretofore entered into by him in making such sale, and particularly in a certain Guarantee Agreement, wherein, amongst other things, said Steinfeld guarantees the title to certain mining claims so sold or agreed to be sold, and the parties of the first and second part desire to indemnify

him against loss by reason of any of the said matters or things so done by him.

"Now, therefore, in consideration of the premises, and of the sum of one dollar (\$1.00) by each of the parties hereto to the other in hand paid, receipt whereof is hereby acknowledged, it is hereby mutually agreed that the purchase price paid and to be paid upon the sale, shall belong to and be the property of the said Silver Bell Copper Company.

"And it is further agreed that the four promissory notes of one hundred thousand dollars (\$100,000.00) each, this day executed by the Imperial Copper Company, to the Silver Bell Copper Company, upon said sale, as well as the proceeds of said promissory notes when collected, shall be held by the said Albert Steinfeld, as trustee, 948 and as security for, and indemnity against loss, damage or expense which may arise to him for or out of, or by reason of any and all obligations and liabilities which he has assumed with the said Imperial Copper Company, or any other person whatsoever.

"And it is further agreed that no dividend shall be declared by the said Silver Bell Copper Company until the stockholders of said Company shall first have fully indemnified said Albert Steinfeld against loss, which might arise to him in the future, from or on account of any such obligations or liabilities so assumed by him.

"In witness whereof, the said corporations, parties of the first and second part, has caused these presents to be signed by its President and Secretary, and its corporate seal to be hereunto affixed by resolution of its board of directors, and the said Albert Steinfeld has hereunto placed his hand and seal the day and year first above written. In triplicate."

That the terms of this agreement, and that it should be executed, were, however, all orally agreed upon before the said sale was 949 completed, or said money was paid, or said notes executed by the said Imperial Copper Company.

XXVI.

That after the said 20th day of May, 1903, and prior to the first day of January, 1904, said Imperial Copper Company, paid two of said promissory notes, paying the principal thereof, with the interest at said rate of six per cent per annum on said principal up to the respective dates of payment, making a total of the cash paid to the said Silver Bell Copper Company, by said Imperial Copper Company, prior to January 1st 1904, for and on account of said purchase and sale of said properties so listed and scheduled in said "Exhibit A" of the sum of \$319,487.50; that the said sums of money aggregating the said sum of \$319,487.50, were received by the said Silver Bell Copper Company from the Imperial Copper Company, as and for the first cash payment, and as the payments of the two promissory notes first falling due on the purchase price of said sale so made to said Imperial Copper Company. That of said sum there was regularly paid out for and on account of certain debts and con- 950 tracts of the Silver Bell Copper Company, a total of \$118,000.00, including the sum of \$18,117.00 paid to Albert Steinfeld May 21st, 1903.

XXVII.

That after the conclusion of said sale to said Imperial Copper Company, and after all papers had been delivered in connection with the said sale and the negotiations in connection therewith, and on May 20, 1903, the board of directors of said Silver Bell Copper Company convened; the following are the records of the minutes of said meeting, viz.:

"A meeting of the directors of the Silver Bell Copper Company was held at the office of the company in Tucson, Arizona, on May 20, 1903, at 4 o'clock p. m., pursuant to call of the President.

Present: J. N. Curtis, President; Albert Steinfeld, Director, R. K. Shelton, Director.

The President reported that the negotiations for the sale of the properties of this corporation had been concluded. That the Imperial Copper Company, as the nominee of George A. Beaton, had agreed to purchase all the mining claims of this company in the

951 Silver Bell Mining District, Pima County, Arizona, and all the machinery, plant and personal property used therewith; also all of the mining claims and personal property used therewith, of the Mammoth Copper Company, as well as certain other mines or interests therein which stand in the name of Albert Steinfeld, and in the individual name of the President, and to pay therefor the sum of \$515,000, as follows: the sum of \$115,000 in cash, which sum it did pay, and is now in the hands of Albert Steinfeld, Treasurer; and the balance, \$400,000 in four equal installments of \$100,000, each, payable in three, six and nine and twelve months from this date, with interest thereon until paid at 6 per cent per annum; and for which deferred payments said company executed to this company its four promissory notes, which now are also in the hands of the Treasurer.

He further reported that the necessary deeds and agreement had been executed by the President and Secretary of this Company and amongst others a Guarantee Agreement which Guarantee Agreement was also signed and executed by the Mammoth Copper Company and by said Albert Steinfeld, individually. The said agree-
952 ments were read and considered.

He further reported that the deeds so executed had been placed in escrow with the Phoenix National Bank of Phoenix, subject to certain escrow instructions, a copy of which escrow instructions were produced and read.

He further reported that Mr. Albert Steinfeld, who had conducted the negotiations with the Imperial Copper Company had again submitted for acceptance, the proposition which he had heretofore submitted in writing on July 15th, 1901, with the modifications, however, that this company shall pay to him forthwith in cash, the sums of money which in said proposition were required to be paid on October 15th, 1901, to-wit: the sum of \$15,192.45, and also shall forthwith pay in cash, interest thereon from October 15, 1901, to this date at the rate of 1 per cent per month amounting to \$2,924.55, making a total of \$18,117.00 and that this company

shall also assume and pay all obligations, which he said Steinfeld, has incurred in conducting the negotiations and in making the sale of said mining claims and property to the Imperial Copper Company, and keep him free and harmless from any and all expense and loss, which may arise to him by reason of any claim or asserted claim, of any person whatsoever, for or on account of, or arising out of or connected with the present sale and negotiations, or any past negotiations or transactions, in regard to said mining claims or any of them. And particularly that this company shall assume and pay unto N. O. Murphy, the commissions which he, said Steinfeld, agreed to pay to said Murphy, to-wit: the sum of \$25,000, said agreement being made for and on behalf of this company; and also shall keep him harmless from loss, damage or expense, by reason of the asserted claim of one, J. M. Burnett, for commissions.

Also that this company shall indemnify him against loss, damage or expense, by reason of his having guaranteed the titles to the mining claims sold, or agreed to be sold, to said Imperial Copper Company, as is set forth in the Guarantee Agreement heretofore submitted to this meeting.

The President also stated that it was necessary to adjust with the Mammoth Copper Company, the disposition that was to be made of the purchase money upon the sale; He then submitted the agreement between this company, the said Mammoth Copper Company and Albert Steinfeld on this point and also covering the matter of guarantee:

After a full consideration the following resolutions were unanimously adopted, to-wit:

Resolved, That all the acts of the President and Secretary of this corporation, and all papers, agreements and deeds signed by them, for or on behalf of this corporation in the matter of the negotiation and sale of this Company's property to the Imperial Copper Company, be and the same hereby are ratified, approved and confirmed.

Resolved, That the proposition of Albert Steinfeld as herewith submitted be, and the same hereby is accepted, and that he (said Steinfeld) be forthwith paid by this corporation the sum of eighteen thousand one hundred and seventeen (18,117) dollars, and that out of the first moneys received by this Company upon the promissory notes of the Imperial Copper Company, he, said Steinfeld, as Treasurer of this Company, shall retain sufficient moneys to pay the amounts necessary to be paid to Margaret Francis and Julius H. Volkert under the agreement with them aforesaid; and to pay to the assigns or legal representatives of Carl S. Nielsen (he being now deceased) and to Mary Nielsen, the amount necessary to be paid under the agreement with said Niensens aforesaid; and when said amounts respectively become due, to pay the same to the parties entitled thereto.

Resolved, That Albert Steinfeld as Treasurer of this Company be, and he is, hereby authorized to pay to N. O. Murphy whatever commissions may be coming to him.

Resolved, That the President and Secretary of this corporation be,

and they hereby are, authorized, empowered and directed, in such manner and form, as they deem necessary or proper, to indemnify said Steinfeld, against all loss, damage and expense that may arise to him by reason of his having guaranteed the titles to the properties so sold, or agreed to be sold to the said Imperial Copper Company, and that he, and they hereby are, authorized, empowered and
956 directed to do or cause to be done all things and to execute all papers, documents or other writings, which they deem necessary in the premises.

Resolved, That the agreement this day made by the President and Secretary of this corporation with the Mammoth Copper Company and Albert Steinfeld, in regard to the disposition of the proceeds of the sale this day made to the Imperial Copper Company, and indemnifying said Steinfeld be, and the same is, hereby ratified, approved and confirmed.

The minutes of this meeting were then read and after first being amended by striking out lines 1 to 16, both inclusive, on page 46 of this book, and striking out part of line 21 and all of lines 22 and 23, on the same page, the same were on motion approved as amended.

On motion the meeting adjourned, subject to the call of the President.

J. N. CURTIS, *President.*

ALBERT STEINFELD, *Director.*

R. K. SHELTON, *Secretary."*

XXVIII.

That in the months of October and November, 1903, said Albert Steinfeld sent all said money and notes, except \$50,000.00
957 which had theretofore been attached in a suit by S. M. Franklin, to the California Bank in San Francisco, and deposited the same in said Bank in his individual name. Plaintiff brought an action in the city and county of San Francisco, state of California, against said Albert Steinfeld and said Bank. Defendants' Exhibit "J" is a copy of the complaint in said action. Plaintiff obtained an injunction therein restraining Steinfeld from receiving and said Bank from delivering to him said money or notes.

XXIX.

That after the 21st day of May, 1903, and some time in the month of May or June, 1903, S. M. Franklin, claiming to be a creditor of the said Silver Bell Copper Company, brought an action against the said Silver Bell Copper Company for the sum of \$51,500, and in said action garnished the sum of \$51,500, as the property of the Silver Bell Copper Company, then in the hands of said Albert Steinfeld. The said action is entitled "S. M. Franklin, Plaintiff, vs. Silver Bell Copper Company, defendant," and was brought in this court. That
958 after said garnishment was levied on said Albert Steinfeld, and some time in the month of January, 1904, said Albert Steinfeld paid back to the Silver Bell Copper Company

\$25,750 of said \$51,500, in his hands retaining the other \$25,750 as security against the said garnishment under an agreement with the said Silver Bell Copper Company that he would hold and retain \$25,750 in his hands as such security against said garnishment, and that after paying to said S. M. Franklin any moneys that might be recovered, or for which he might get judgment in said action, he would pay to the Silver Bell Copper Company the balance of \$25,750 so left in his hands as security after deducting the money so paid to him said S. M. Franklin.

The said Albert Steinfeld thereafter continued to hold and at the time of commencement of this action still held said sum of \$25,750 as such security, the same being the property of the said Silver Bell Copper Company.

XXX.

That as hereinabove found, said Albert Steinfeld, as treasurer and trustee of the Silver Bell Copper Company, on May 20th, 1903, received from said Imperial Copper Company the sum of 959 \$115,000 in cash; That on August 23rd, 1903 one of said four promissory notes was paid, and said Steinfeld, as treasurer and trustee, as aforesaid, received in payment of the same the sum of \$101,500.00; That on November 23rd, 1903, another of said notes was paid and said Steinfeld, as such treasurer and trustee, received in payment of the same, the sum of \$102,987.50, making a total of \$319,487.50 that said Steinfeld as such treasurer and trustee had received by November 23, 1903, from said Imperial Copper Company on account of such purchase price.

That said money was disbursed by said Steinfeld as shown by his account presented and filed on December 26th, 1903, as hereinafter found.

XXXI.

That after the controversy arose in the city and county of San Francisco by and between the said plaintiff and the said Albert Steinfeld, resulting in the bringing of the action above referred to, on the 26th day of December, 1903, a meeting of the stockholders of said Silver Bell Copper Company was held at the city of Tucson, 960 County of Pima, Territory of Arizona, at which were present Albert Steinfeld, R. K. Shelton, J. N. Curtis and L. Zeckendorf, Eugene S. Ives, attorney for and representing Albert Steinfeld, and William H. Barnes, representing and attorney for L. Zeckendorf.

XXXII.

That at said meeting of December 26th, 1903, the following proceedings and discussions took place, to-wit:

"Meeting of the Stockholders of the Silver Bell Copper Company,
Held at the Office of Smith & Ives, Tucson, Arizona, December
26th, 1903, 4:00 p. m.

By Mr. Ives:

If you will pardon me for making an opening statement—

We are here to see what we can do. You made us a proposition which was the same as the proposition which was submitted by Mr. Lilleanthal in San Francisco.

Now, we are unwilling, at this stage of the game, to do anything.

When I say "we," I mean Mr. Steinfeld, but we want to do
961 things if we can agree. As I gathered, one of the chief con-
tentions of Mr. Zeckendorf's was that Mr. Steinfeld had the
personal custody of the proceeds of these notes, and of the notes, and
he objected to it.

Now, since then, he has brought two suits, one attachment or
open suit for money in which an attachment has been issued; and
the other, a stockholders' suit in which he has obtained an injunc-
tion.

Now, we want those suits disposed of. I am talking frankly in
that matter—and until disposed of, Mr. Steinfeld is unwilling to
agree to anything. He feels his business integrity has been im-
pugned; and he wants them disposed of. Now, we want to meet
you as far as we can. We will never be willing to admit that Mr.
Steinfeld had the possession of these moneys wrongfully. We
maintain now, as we maintained then, that he had them by virtue
of the agreement which was executed in pursuance of a resolution
of the Board of Directors, which he claims, and we believe was, a
valid resolution, and a valid agreement. (I am not arguing
962 that point with you.) He claims that. Now, you have at-
tacked that agreement and the resolution. The prayer of
your complaint asks that a receiver be appointed to hold the moneys
and the notes in the Bank of California for the benefit of the Silver
Bell Copper Company; that an injunction issue restraining Stein-
feld from receiving, and the Bank of California from delivering
to him said money and notes; that Steinfeld be required to set
forth—

(3) That Steinfeld be required to set forth the nature of his
claim to said money and notes and the terms of the agreement; and
to account to the Silver Bell Copper Company for moneys received.

(4) That the resolution and agreement therein referred to be
declared null and void.

(5) That the plaintiff have such other and further relief as may
be just in the premises.

The first paragraph, that a receiver be appointed, I will pass.

The second subdivision is your prayer that an injunction issue;—
that has been issued.

And third, that Mr. Steinfeld be required to set forth the
963 nature of his claim; — he has done; he has given you a copy
of the resolution which you already had; and he has given
you a copy of the agreement which you did not have before, al-

though we stated it as best we could verbally to Mr. Zeckendorf and Mr. Lilleanthal in San Francisco.

The fifth, asking for any other or further relief necessarily, I pass.

The fourth paragraph, that the resolution and the agreement herein referred to be declared null and void, we are willing to accede to.

I omitted to state that the third subdivision of your prayer asks, not only that he disclose the nature of his claim, but that he account for the moneys. That account he has rendered, and will be prepared to submit it at this meeting. He has resigned his office of treasurer of the Company, and he has turned over to Mr. Curtis all of the money which by such account appears to have been collected by him and not expended, except \$51,500.00 which has been garnished in his hands in the Franklin suit, and he has given to the Company a bond with two good sureties in that sum of money, that he will turn over that money to the Silver

964 Bell Copper Company whenever the suit is dismissed, or will turn over the balance, if any judgment should be collected, after paying what amount of money has been adjudged by judgment or otherwise to be due Mr. Franklin.

So we have set forth the nature of our claim. We have made the account; we have turned over the money. We are unwilling to admit that we did not have the right to this money. We still assert that this resolution and agreement was honest and valid, and that Mr. Steinfeld, under it, had the right to this money, and had the right to act as he has done. But since you attack it, we are willing to agree to pass a resolution in the language of your prayer in which we will rescind the resolution and agreement, and relinquish all right whatever to the personal custody of that money, and turn it over to the company.

Now, I drew a little resolution, which I would suggest one of you gentlemen (I am not a member of the Board) should offer. But first I suggest an organization."

Mr. Shelton reads proposed resolution: "Resolved that the agreement executed on May 20th by the President and Secretary
965 of the corporation, the Mammoth Copper Company and Albert Steinfeld, be and the same is hereby rescinded and that the said agreement and resolution passed on said day be declared null and void."

Judge BARNES: We cannot settle the prayer of the complaint here.

Mr. IVES: We are acquiescing in your demand, that is what I mean.

Judge BARNES: Have you got a copy of that contract to attach to that resolution?

Mr. IVES: Yes, I am perfectly willing to do that.

Judge BARNES: And let that go on the minutes?

Mr. IVES: Certainly.

Mr. IVES: I intended this to be a Stockholders' meeting. We will now organize as a Stockholders' meeting.

Our desire is in good faith to rescind that resolution, but we will never admit we acted wrongfully in taking the money; you attacked the resolution, and we are willing, if you wish, to rescind it.

966

Stockholders' Meeting.

Present:

J. N. Curtis, President.

R. K. Shelton, Secretary.

Stock represented:

Mr. L. Zeckendorf	250 shares
Mr. Steinfeld	249 shares
Mr. Albert Steinfeld, Trustee	330 shares
Mr. R. K. Shelton	1 share
Mr. J. N. Curtis	170 shares
Total	1000 shares

Judge BARNES: There is a question about that.

Mr. IVES: That is the way it appears on the books of the Company; that does not consider any question whatever as to the ownership of the stock; that is the way it appears on the books of the Company for voting purposes only.

Judge BARNES: As I read the minutes—I have a copy of the minutes—that heretofore in the meetings of the stockholders, 529 shares of stock of this company have stood in the name of L. Zeckendorf & Company, and they have been voted as such at all 967 stockholders' meetings until this. That is an asset of L. Zeckendorf & Co.; never been divided; an asset of the company; would be liable to its debts; the creditors could pursue it; it belongs to L. Zeckendorf & Co.; it does not belong to Mr. Zeckendorf or Mr. Steinfeld, except as they agree to separate it.

Mr. IVES: Has it ever been separated on the books of the company?

Mr. STEINFELD: Yes, sir.

Mr. IVES: As far as the stockholders' meeting is concerned, the books of the company control. There is no waiver with respect to any ownership of stock.

Judge BARNES: We have no objection to passing that resolution on behalf of Mr. Zeckendorf.

I don't care to discuss the questions you have gone over. I don't know as anything is to be gained by it. If the contract of May 20th is rescinded that is all we care for on that point.

Mr. CURTIS: We have not voted on this resolution.

968 Mr. IVES: Call the roll.

(Mr. Curtis called the roll and the following named stockholders voted "Yes" in favor of said resolution, the number of shares opposite their respective names:)

r. L. Zeckendorf.....	250 shares.	Yes.
r. Albert Steinfeld.....	249 shares.	Yes.
r. Albert Steinfeld, Trustee.....	330 shares.	Yes.
r. R. K. Shelton.....	1 share.	Yes.
r. J. N. Curtis.....	170 shares.	Yes.

Mr. IVES: I will change this resolution: "Agreement executed on May 20th, by the President and Secretary of the corporation, with the Mammoth Copper Company with Albert Steinfeld, a copy of which is hereto annexed.

Judge BARNES: Yes, I will see if it is the contract, I think it is.

Mr. IVES: It is a copy of the contract I served you with.

Mr. IVES: I will add that Mr. Steinfeld, in addition to giving Mr. Curtis the money, has given Mr. Curtis an order upon the Bank of California; I mean Mr. Curtis as officer of the corporation, of the Silver Bell Copper Company,—an order upon the Bank of California for the money they have, and the notes, so that Mr. Steinfeld no longer makes any claim whatever for the personal custody of either the money or the notes.

Judge BARNES: As a stockholder of this company, Mr. Zeckendorf protests against the funds of this company being deposited in any other than in the name of the company, by its treasurer, and he insists as a stockholder, that the treasurer be required to give a bond for the faithful performance of his duties. And he protests against the funds of the company being kept in the name of anybody either the treasurer personally, or in any other manner except in the name of the company, and to be drawn out by the treasurer on direction of the company. If Mr. Steinfeld resigns we will choose another treasurer.

Mr. IVES: The directors will have to choose the treasurer.

Judge BARNES: Mr. Zeckendorf does not object to Mr. Steinfeld being the treasurer of this corporation.

Mr. IVES: I will make a motion in the name of Mr. Steinfeld.

Mr. Steinfeld moves that the funds of the company shall be deposited in the name of the company by its treasurer, and shall not be kept in the name of anyone as trustee or personally, or in any manner except in the name of the company, by its treasurer, and shall be drawn out only by the treasurer at the direction of the company.

We have left out what you said about the bond, for the present to show.

Mr. Steinfeld makes that motion. Is that seconded by Mr. Zeckendorf?

Mr. ZECKENDORF: Yes.

The aforesaid resolution put to vote and all the stock voted in favor of the resolution and the same was declared passed.

Judge BARNES: Now with reference as to who shall be treasurer. That is a question for the Board of Directors, and I would suggest on behalf of Mr. Zeckendorf, when they do choose a treasurer that

971 Mr. Zeckendorf has no objection to Mr. Steinfeld being treasurer; but that whoever shall be treasurer they shall give a reasonable bond in proportion to the amount of money in his hands.

Mr. IVES: That is a very large amount of money.

Mr. ZECKENDORF: I think it should be for the amount involved.

Judge BARNES: Yes, for the amount in his hands.

Mr. IVES: That is a most unusual proceeding. We will consider it later.

Judge BARNES: Have you any further business you desire to bring before the meeting?

Mr. IVES: I don't know of any.

Judge BARNES: Now we want to say here at this meeting, Mr. Shelton appears as a Director of the Company. He is an employee of L. Zeckendorf & Co., is not the owner of any stock and therefore he has no right to hold the office of director; he evades it by having one share of stock transferred to him; he don't own it; it is a mere evasion of that statute which says that a director must be a stockholder. It means a bona fide stockholder. We have no objection to Mr. Shelton personally, he is an employee down there; he is down there to serve L. Zeckendorf & Co., and we don't want to embarrass him by having him get into difficulties of this corporation; and we think that this directors' meeting ought to take some action in that particular, if they desire to do it. Mr. Zeckendorf is a minority stockholder, but he is a large stockholder, besides the assets belong to L. Zeckendorf & Co. He is one of the three men that own this property. This property is all owned by Mr. Steinfeld, Mr. Curtis and Mr. Zeckendorf. Mr. Zeckendorf is the only one not allowed to be a director; and we think that they ought to be directors who are bona fide stockholders.

Mr. IVES: We will consider that. For myself, personally, I see nothing unreasonable in that, but until these suits are disposed of we feel we have gone as far as we care to.

Judge BARNES: There is another matter we desire to bring before you. This company has practically sold its assets, and got nothing left but the proceeds of that sale; it has got cash and notes coming in. There are some obligations. There is an obligation on Mr. Steinfeld's part to guarantee these titles up to the 20th of May, when the last payments are due. Now, these guarantees are matters that Mr. Zeckendorf regards as of small moment; he would be willing to assume the obligations of all of them for fifteen or twenty thousand dollars. We do not think that with \$200,000 of money coming in between now and next April, many times more than enough to meet any obligation that can come up, including the suit of Mr. Franklin, or any other threatened suits, or to make good the guarantee of good title up to the 20th of May. That it is an injustice to the stockholders of this company to hold the funds back as against Mr. Franklin's suit; that suit cannot possibly be tried until long after the 20th of April. We think it an injustice to these stockholders to tie up these funds, when there is over \$200,000 coming in, more

than ample to pay them. More than that, Mr. Zeckendorf is amply good to protect Mr. Steinfeld to the extent of his interest in this company. We feel that the moneys on hand ought to be divided up: First to the paying of Mrs. Francis, whatever it is; \$12,000 to the paying of Mrs. Nielsen; and that the balance of the money ought to be paid to the stockholders; they ought to have the use of the money, and leave it to the last payment to the protection of these obligations. They are not dangerous, to the extent of more than \$50,000 at the outside, and there will be \$100,000 and six per cent interest due on the 20th of May. Mr. Franklin's suit cannot be tried until long after that.

So that, we think that the moneys on hand, the proceeds of the sale of this property, after deducting sufficient to pay Mrs. Nielsen and Mrs. Francis, that the balance of this money should be distributed, and that there ought to be a dividend made of these funds.

And I will make a still further suggestion. It has been stated here that they are very anxious to have this injunction dismissed. If this be done, and the money be reserved or paid to Mrs. Nielsen and Mrs. Francis and a dividend be made of the money on hands, leaving to the last payment the protection of Mr. Steinfeld's obligations, and also by leaving these notes in the hands of the Bank of California with directions to collect this money and deposit it to the credit of the company. With that done, I am satisfied that Mr. Zeckendorf would be very willing to dismiss the injunction suit.

Mr. IVES: While in all human probability these notes will be paid, they have not been paid yet. If the Imperial Copper Company should turn out to be unable or unwilling to pay them the mine will come back.

Judge BARNES: And they are good for all these obligations.

Mr. IVES: The mines would come back. Now, whether it would be good policy for this company to distribute all of its funds without any money to work the mines, I concur that that is a question of judgment.

Judge BARNES: These three gentlemen are well able to do that and they can raise money.

Mr. IVES: It won't be long after the notes are paid. I won't say that there won't be any distribution, but I think that these suits should be dismissed without any condition whatever. We have complied with the prayer of your complaint.

Judge BARNES: I won't say whether they will or not. I am simply discussing it as a business policy; that these funds ought to be distributed. The company is not engaged in any business; its mines are sold; if they should come back they would come back free from any obligations. There is no reason why my client, Mr. Zeckendorf, should not have the use of his money, no reason in the world; I think Mr. Curtis has about \$17,000 of his money in it; I don't see why he, Louis Zeckendorf, should not have his.

Mr. IVES: That is a question; it is a matter of policy; and there

is a great deal to say in support of the view you take of it. That will be considered. Until the suits are disposed of——

Judge BARNES: Those things will have to be somewhat simultaneously, you cannot expect those things to be done unless they are done as current acts.

Mr. IVES: This is practically a demand by Mr. Zeckendorf who chances to be plaintiff in a suit which *it* appears to me to be totally without merit——

Judge BARNES: I have not said that; I said we would consider this matter; I have not said what we would do; I simply suggested that it would be wise to consult together——

977 Mr. IVES: We feel that we should be met now and the injunction dismissed and the attachment suit.

Judge BARNES: We will consider that.

Mr. IVES: I will now show you this statement.

(Statement omitted in this copy.)

Mr. IVES: We are now asking you to audit it; we only want you to see what has been done.

Judge BARNES: Now this item of \$51,500 garnishee of Mr. Franklin; I don't think that money should be held back from these stockholders that is a contested lawsuit, and it will probably not be settled for two or three years.

Mr. IVES: Mr. Curtis, has Mr. Steinfeld turned over to you as officer of this company the sum of sixty thousand dollars in money?

Mr. CURTIS: Yes, sir. Q. You have that money? A. Yes, sir. Q. And will now deposit it to the credit of the Silver Bell Copper Company in pursuance of this resolution? A. Yes, sir. Q. You

978 have an order upon the Bank of California for the \$49,987.50? A. Yes, sir. Q. You have it as officer of this company?

A. Yes, sir. Q. Signed by Steinfeld, instructing the bank to deliver it to you? A. Yes, sir; as officer of this company.

Q. And when you get it as officer of this company, you propose to deposit it to the credit of the company in pursuance to the resolution passed here today? A. Yes, sir.

By Judge BARNES: Where deposit it?

Mr. IVES: Where do you suggest?

Judge BARNES: The banks here in Tucson are good banks; I don't see why you should go to California.

Mr. IVES: Is that satisfactory to you? Judge Barnes suggests that the money be deposited in the banks here at Tucson.

Mr. ZECKENDORF: I have no objection.

Mr. IVES: Is that satisfactory to you, Mr. Shelton?

Mr. SHELTON: Yes, sir.

Mr. IVES: Then Mr. Curtis you will deposit it here in Tucson.

Mr. IVES: Mr. Curtis, a bond has been given by Mr. Steinfeld for this \$51,500 garnishee of Mr. Franklin's. You have that
979 bond as officer of the company? A. Yes, sir.

Mr. IVES: Now, Judge, we have gone quite a little distance.

Judge BARNES: Yes, and we will think it over. I think I have

	To Smith & Ives, Ret.....	500.00	
25	" " " "	1,000.00	
Dec. 26	Attachment Bank Cal.....	49,987.50	
	Balance on hand.....	51,500.00	
		<hr/>	
		102,987.50	102,987.50
		<hr/>	
	Balance on hand 1st note.....		8,500.00
	Balance on hand 2nd note.....		51,500.00
	Attached Bank Cal.....		49,987.50
			<hr/>
			109,987.50
			<hr/>

That in the stockholders' meeting held on the 26th day of December, 1903, hereinabove set out, plaintiff, in voting to rescind said agreement of May 20th, 1903, and the resolution hereinabove mentioned, did not understand or know or believe that anybody claimed or would claim that the action taken on that day by the stockholders of the Silver Bell Copper Company, would operate to give either Albert Steinfeld or the Mammoth Copper Company any right or claim to any of said proceeds of said sale, nor did the directors in good faith understand or believe that the stockholders intended to instruct them to rescind any portion of the agreement and resolution other than that relating to the indemnity agreement hereinbefore mentioned.

XXXIII.

That thereafter on said 26th day of December, 1903, a special meeting of the Board of Directors of said Silver Bell Copper Company was held at which were present J. N. Curtis, R. K. Shelton, Albert Steinfeld and Eugene S. Ives, Attorney for Albert Steinfeld.

That thereupon and at said meeting, Albert Steinfeld resigned as treasurer of said Silver Bell Copper Company, and J. N. Curtis was elected treasurer of said company, and thereupon on motion of R. K. Shelton, acting at the request of said Eugene S. Ives, attorney for said Steinfeld, the following resolution was adopted, viz:

"Whereas, At the twelfth meeting of the Board of Directors of this company held at the office of the company in the city of Tucson on the 20th day of May, 1903, the proceedings whereof appear upon pages 43, 44, 45, 46, 47 and 48 of the minute book of this corporation, certain resolutions were passed, which said resolutions are set out in full upon said minutes; and,

"Whereas, Simultaneously with the passage of the resolutions, a certain agreement of date May 20th, 1903, was executed and delivered, which said agreement was in the words and figures following, to-wit:

"This agreement, Made this 20th day of May, 1903, between the Silver Bell Copper Company, a corporation organized and existing under the laws of the Territory of Arizona, party of the first part, and the Mammoth Copper Company, a corporation organized and existing under the laws of the Territory of Arizona, party of the

second part and Albert Steinfeld of Tucson, party of the third part, witnesseth:—

Whereas, The parties hereto have this day agreed to sell certain mining claims and property to the Imperial Copper Company, a corporation, as per written agreements heretofore made, and deeds for which property are now in escrow with the Phoenix National Bank of Phoenix, Arizona; and,

Whereas, The parties hereto desire to settle and determine as between themselves, what disposition shall be made of the proceeds of said sale; and,

Whereas, The said Albert Steinfeld has assumed certain obligations with said Imperial Copper Company as more fully appears in the various agreements heretofore entered into by him in making such sale, and particularly in a certain Guarantee Agreement wherein amongst other things said Steinfeld guarantees the title to certain mining claims so sold or agreed to be sold, and parties of the first and 2nd part desire to indemnify him against loss by reason of any of said matters or things so done by him;

Now therefore, in consideration of the premises and of the sum of one dollar (\$1.00) by each of the parties hereto to the other in hand paid, receipt whereof is hereby acknowledged, it is hereby mutually agreed, that the purchase price paid and to be paid upon the said sale, shall belong to and be the property of the said Silver Bell Copper Company.

And it is further agreed that the four promissory notes of one hundred thousand dollars (\$100,000) each, this day executed by the Imperial Copper Company to the Silver Bell Copper Company, upon said sale, as well as the proceeds of said promissory notes when collected, shall be held by the said Albert Steinfeld as trustee, and as security for and as indemnity against loss, damage, or expense which may arise to him for or out of, or by reason of any and all obligations and liabilities which he has assumed with the said Imperial Copper Company, or any other person whatsoever.

And it is further agreed, that no dividend shall be declared by the said Silver Bell Copper Company until the stockholders of said company shall first have fully indemnified said Albert Steinfeld against loss, which might arise to him in the future, from or on account of any such obligations or liabilities so assumed by him.

In witness whereof, The said corporation, parties of the first and second part, has caused these presents to be signed by its president and secretary and its corporate seal to be hereunto fixed by resolution of its Board of Directors, and the said Albert Steinfeld has hereunto placed his hand and seal the day and year first above written. In triplicate." And,

Whereas, In pursuance of said agreement four certain promissory notes made by the Imperial Copper Company to the order of the Silver Bell Copper Company were endorsed and turned over to Albert Steinfeld; and,

Whereas, Said Steinfeld duly received the proceeds of the first said notes and paid out for the benefit of this company a certain proportion thereof; and,

Whereas, The said Steinfeld deposited the three remaining notes with the Bank of California, at San Francisco for collection; and,

Whereas, The said Bank of California presented for collection the first maturing of the said notes, and received the proceeds thereof and turned over to said Steinfeld, all of the said proceeds except the sum of \$49,987.50; and,

Whereas, The said bank still has the last mentioned sum and the two remaining notes; and,

Whereas, Louis Zeckendorf, who appears upon the books of this company to own 250 shares of the capital stock of this company in violation of the rights of the said Steinfeld under the said agreement and resolutions, notified the Bank of California not to pay the said sum of money or to deliver the said notes or the proceeds thereof to the said Steinfeld; and,

Whereas, The said Zeckendorf did thereafter bring suit in the Superior Court of the County of San Francisco and State of California, against this company, the Bank of California, Albert Steinfeld, J. N. Curtis and R. K. Shelton, the directors of this company, wherein he filed his verified complaint, in which said complaint he alleged, referring to the said resolution, as follows:

989 That the said pretended resolutions are void and of no effect as against said Silver Bell Copper Company or its shareholders or at all, in that said Steinfeld joined in the vote therefor, and in that the other two directors are in the employ of the said Steinfeld and wholly under his control; and in that said Shelton does not own any shares of stock of said corporation, and in that they were pretended to be adopted at the instigation of said Steinfeld and as part of a claim on his part to defraud said company and its shareholders * * * and said two other directors and defendants Curtis and Shelton then and always were and still are acting solely in the interest of and are under the complete control and dominion of said Steinfeld and blindly, and without consideration of the interest of said corporation, carry out all of his directions.

That it would be a futile and vain proceeding for this plaintiff (Zeckendorf) to demand of said Board of Directors to take proceedings on behalf of said Silver Bell Copper Company against said

Steinfeld to recover the moneys and notes so unlawfully
990 held by him, and which he claims to have the right to hold as against said corporation, or to rescind said last mentioned agreement or resolution, because said directors and defendants Curtis and Shelton are acting solely in the interest of and are under the sole control of said Steinfeld and would continue so to be even if informed of the injurious effect of their actions, and would yield to his influence and control even if informed of the purposes and uses for which that influence is exercised; And in which said complaint the said Zeckendorf demanded judgment as follows:

(1) That a receiver be appointed to hold said moneys and said notes in said Bank of California for the benefit of said Silver Bell Copper Company, during the pendency of this suit;

(2) That an injunction issue restraining said Steinfeld from re-

ceiving, and said Bank of California from delivering to him said moneys or said notes now in the custody of said Bank of California:

(3) That said Steinfeld be required to set forth the nature of his claim to said moneys and said notes, and the terms of the agreements referred to in said resolutions, and to account to said Silver Bell Copper Company for moneys received or that may hereafter be received by him belonging to said corporation;

(4) That said resolutions and the agreements therein referred to, be declared null and void."

And,

Whereas, The said resolutions were passed by the Board of Directors of this company, and the said agreement was executed by its officers in good faith and with the sole intent and purpose to advance and protect the interest of this company and of all persons concerned, nevertheless in view of the said actions of the said Zeckendorf, the owner of a large portion of the stock of this corporation, and of the charges and allegations which he has made, and of the hostile attitude which he has assumed toward the entire transaction, and in compliance with his wish, prayer and demand, and in order to avoid litigation; and all of the owners of the stock of the said corporation except the said Zeckendorf having been consulted by the directors, and having acquiesced in the foregoing recitations and in this action about to be taken by this board, and the said Albert Steinfeld and the Mammoth Copper Company having indicated their willingness and consent thereto, and having offered to sign any paper or papers, and to do upon demand all things and acts necessary to accomplish and consummate a full re-

cission of the said agreement; and the said Steinfeld having given to this company an order upon the Bank of California for the said money and notes, and having tendered to this company all of said funds still in his hands, together with a full and complete account of all moneys received and disbursed by him.

Be it resolved:

(1) That the said resolutions passed by the Directors on the said 20th day of May, 1903, be, and the same are, rescinded and repealed.

(2) That the said agreement heretofore recited in full be rescinded and declared null and void.

(3) That the president and treasurer of this company be empowered to receive from the said Steinfeld and from the Bank of California all of the said funds and the two said notes of the Imperial Copper Company which have not yet matured, and to give his proper receipt therefor.

(4) That the officers of this company be instructed to execute with and deliver to said Steinfeld and Mammoth Copper Company, an agreement rescinding the said agreement ab initio and to do and cause to be done all such acts and things as may be necessary to accomplish and consummate the full re-cission of the said agreement; and that J. N. Curtis, the president and treasurer of the company, be instructed to receive from said Steinfeld the

funds tendered by him as hereinbefore recited, and be further instructed to demand and receive from the Bank of California the said money and notes now held by the said bank."

The foregoing resolution was adopted, Mr. Curtis and Mr. Shelton voting in the affirmative, and Mr. Steinfeld being present not voting.

Mr. Steinfeld thereupon made the following statement:

"I concur in the above resolution and consent to the re-cission of the said contract. I have not voted thereon by reason of the fact that it might be stated that I was an interested party."

Mr. Shelton offered the following resolution:

"Resolved, That on account of Mr. Albert Steinfeld of 994 funds of the Silver Bell Copper Company, held by him under a certain agreement executed on May 20th, 1903, which has been this day rescinded, which said account is as follows:

Silver Bell Copper Company in Account with Albert Steinfeld.

1903.			
May 20	By Imperial Cop. Co. 1st payment.....	\$115,000.00	
May 21	To teleg. trans. L. Zeckendorf & Co.....	\$75,000.00	
	Less ret.	617.00	
		\$74,387.00	
	To commission paid N. O. Murphy.....	22,500.00	
	To A. Steinfeld cont.....	18,117.00	
		115,000.00	115,000.00
Aug. 23	By Imperial Cop. Co. 1st note.....		101,500.00
Aug. 23	To L. Zeckendorf & Co., dep.....	35,000.00	
Sep. 4	To L. Zeckendorf & Co., dep.....	5,000.00	
Oct. 20	To F. J. Heney, contract.....	1,500.00	
	To garnishee S. M. Franklin suit.....	51,500.00	
	To balance on 'and.....	8,500.00	
		101,500.00	101,500.00
Nov. 23	By Imperial Cop. Co. 2nd note.....		102,987.50
Nov. 25	To Smith & Ives, ret.....	1,500.00	
	To attachment Bank Calif.....	49,987.50	
	Balance on hand.....	51,500.00	
		102,987.50	102,987.50
	Balance on hand 1st note.....		8,500.00
	Balance on hand 2nd note.....		51,500.00
	Attached Bank of California.....		49,987.50
			109,987.50

995 Be, and is hereby audited and approved.

That this plaintiff had no knowledge whatsoever of the holding of said Directors' meeting on the 26th day of December, 1903, until after the 21st day of January, 1904, and had no knowledge until said last mentioned date that any such meeting was planned or contemplated.

That after said directors' meeting and on the said 26th day of December, 1903, and in pursuance of said resolutions of said Direc-

tors' meeting an agreement was executed and delivered, which is defendants' Exhibit S; and in pursuance of said resolution and agreement, on the 26th day of December, 1903, after the adjournment of the stockholders' and directors' meetings held on said day said Steinfeld paid to Curtis, treasurer of the Silver Bell Copper Company, the sum of \$18,117.00.

XXXIV.

That on the 26th day of December, 1903, and prior to the said stockholders' meeting, the said Steinfeld turned over to the said J. N. Curtis, treasurer of the said Silver Bell Copper Company, all funds in his hands belonging to said company except the sum of \$51,500.00 which had been garnisheed in his hands in a suit pending against the said company, instituted by one Selim M. Franklin, and except certain money and two promissory notes which had been deposited by him with the Bank of California in suits instituted by Louis Zeckendorf, and at the same time the said Steinfeld delivered to the said treasurer of the said corporation an order upon the Bank of California, authorizing and requiring the said bank to deliver to the said corporation or its duly authorized officer the said money and notes so deposited by him as aforesaid, and the same were, after December 26th, 1903, and prior to January 10th, 1904, delivered and turned over by said bank to the said treasurer of the said Silver Bell Copper Company, with the knowledge, assistance and consent of said Albert Steinfeld.

That on the 9th day of January, 1904, said Albert Steinfeld paid to Francis and Volkert the sum of \$12,700.00.

997

XXXV.

That on the 16th day of January, 1904, defendants Steinfeld, Curtis and Shelton met as Board of Directors of said Silver Bell Copper Company, no one else being present except Eugene S. Ives, the attorney for said Steinfeld, and no one else having any notice or knowledge of such meeting, and as such board at the request of said Ives and Steinfeld, purported to adopt and pass a resolution and cause the same to be spread upon the minute book of said corporation, reading as follows:

"Whereas, the properties of this company together with certain mining properties belonging to and owned by the Mammoth Copper Company and Albert Steinfeld, respectively, were on or about the 20th day of May, 1903, sold to the Imperial Copper Company for the gross sum of \$515,000, payable \$115,000 in cash and the balance in four promissory notes, each for the sum of \$100,000 with interest at the rate of 6 per cent per annum, payable respectively three, six, nine and twelve months after date; and,

998 "Whereas, deeds properly executed by this company for the properties owned by it, and properly executed by the Mammoth Copper Company for properties owned by it and properly executed by Albert Steinfeld for properties owned by him, have

been deposited in escrow with the Phoenix National Bank, to be delivered to the guarantee, in all of such deeds, to-wit, the said Imperial Copper Company, upon the payment of the said notes and all of them, according to the tenor thereof; and,

"Whereas, simultaneously with the said sale an agreement was made between this company and the said Mammoth Copper Company, and the said Albert Steinfeld, which provided for the disposition of all of the said purchase price; and,

"Whereas, the said agreement was by consent of all parties thereto and of all parties interested therein, rescinded on or about the 26th day of December, 1903; and,

"Whereas, the said Albert Steinfeld did on or about the 26th day of December, 1903, return to this company, by paying 999 the same to the treasurer thereof, the sum of \$319,487.50 upon said purchase price and consideration for the said agreement rescinded as aforesaid; and,

"Whereas, previous to the said rescission of said agreement the treasurer of this company had received the sum of \$319,487.50 upon the said purchase, and has at this time in his hands two of the said notes, to-wit, the notes becoming due on the 20th day of February, 1904, and the 20th day of May, 1904; and,

"Whereas, Albert Steinfeld and the Mammoth Copper Company jointly do claim that the properties owned by them and sold to the Imperial Copper Company as aforesaid, were and are of far greater value than the property owned by this company and sold to the Imperial Copper Company as aforesaid; and,

"Whereas, the said Steinfeld and the Mammoth Copper Company acting jointly as aforesaid have asserted their ownership of and right of possession to more than one-half of the said purchase price, and have offered to accept one-half of the cash received, and one of the said promissory notes in full of all 1000 of their claim to any part or portion of the said purchase price; and it appearing by the books of this company that of the said sum of \$319,387.50 the sum of \$25,000 has been paid to N. O. Murphy and A. S. Donau for commissions — effecting the said sale, and that the sum of \$3,000 has been paid to attorneys-at-law for services rendered to this company, and the said \$28,000 being properly a charge upon the whole of said purchase price; and,

"Whereas, Selim M. Franklin has brought suit against this company for the sum of \$51,500, and an attachment has been issued in said suit, and the said sum of \$51,500 has been garnisheed in the hands of Albert Steinfeld, who at the time of said garnishment was holding that portion of the said purchase price in pursuance of the agreement rescinded as aforesaid and up to this date has been held by him; and,

"Whereas, the said Albert Steinfeld has given this company his bond therefor and has now returned to the treasurer of this company \$25,750 thereof, the receipt whereof is hereby acknowledged:

1001 "Now, therefore, be it resolved that upon the receipt from the said Mammoth Copper Company and Albert Steinfeld

of a release jointly and severally of all right and interest in the said purchase price whatsoever, except such as Albert Steinfeld may have as a stockholder of this company, the treasurer of this company be and is hereby authorized and directed to pay to the said Albert Steinfeld the sum of \$145,743.75 in cash, the same being one-half of the said sum of \$319,487.50, the total cash received, less the said sum of \$28,000; and that the treasurer of this company be and is hereby authorized and directed to endorse and deliver to the said Albert Steinfeld one of the said promissory notes."

That said Curtis and Shelton in voting for the adoption of said resolution, and said Curtis in paying out the money and turning over the note thereunder, as hereinafter found, consulted with no person whomsoever, except said Steinfeld and his attorney Eugene S. Ives, and in so voting and acting, said Curtis and Shelton were under the complete dominion and control of said Steinfeld, 1002 and voted and acted on his orders and not otherwise.

XXXVI.

That thereupon said J. N. Curtis, being then the treasurer of said Silver Bell Copper Company and as such having in his possession the cash and under his control the notes of said company above mentioned, and under no other authority or claimed authority than as heretofore set out, paid to the said Albert Steinfeld of the funds held by him as treasurer of the said Silver Bell Copper Company then in his, Curtis', hands as such treasurer, the sum of \$145,743.75 in cash (the same being one-half of the sum of \$319,487.50, less the sum of \$28,000) and thereupon delivered to said Albert Steinfeld one of said two promissory notes, and which said funds and notes said Albert Steinfeld received from said Curtis, the treasurer of said Silver Bell Copper Company, and thereupon said Steinfeld appropriated said moneys so received and said note to his own individual use and not to the use or benefit of any other person or corporation whatsoever.

1003 That the said note so delivered to said Albert Steinfeld at the time of said delivery was worth the full amount of the principal and interest thereof, viz: \$100,000.00 with interest thereon from the 20th day of May, 1903, to the 20th day of January, 1904, at the rate of six per cent per annum, and said Steinfeld collected said full sum thereon and retained the same to his own use.

That said Steinfeld also retained the sum of \$25,750, the funds of said corporation garnisheed by S. M. Franklin and which still remained in his hands as treasurer aforesaid, and which with said sum of \$145,743.75 in cash, so paid to him by said J. N. Curtis as the treasurer of said company, made a total sum of \$171,493.75 in cash.

That said Albert Steinfeld collected on said note so delivered to him prior to the commencement of this action the sum of \$103,967.00, which with said sum of \$145,743.75, made a total sum of \$249,710.75, which said Albert Steinfeld so received from said defendant corporation, and all of which said sum before the com-

mencement of this action said Albert Steinfeld took as his own property, to his own use, and said Albert Steinfeld thereafter
1004 kept the same as his own property and not as the property of any other person, firm or corporation, and not for the use or benefit of any other person, firm or corporation, and that no part of said sum has been paid back to said Silver Bell Copper Company.

XXXVII.

That subsequent to the 10th day of January, 1904, and prior to the 16th day of January, 1904, said Silver Bell Copper Company collected on the other of said two promissory notes the sum of \$103,-967, and which said sum was paid into the treasury of said Silver Bell Copper Company.

XXXVIII.

That on the 20th day of January, 1904, the directors of the said Silver Bell Copper Company passed a resolution, declaring a dividend of \$111.00 per share on the capital stock of said Silver Bell Copper Company. Said Albert Steinfeld thereupon collected and received from the treasurer of said corporation the sum of \$111.00
1005 per share as such dividend on the 300 shares of stock belonging to said Silver Bell Copper Company, standing in his name as trustee, as aforesaid, received as such dividend on said stock the sum of \$33,300.00 and which said sum the said Albert Steinfeld thereupon converted to his own use and benefit and not to the use or benefit of any other person or corporation whatever, and the same has not, nor has any part thereof, been paid to or for the Silver Bell Copper Company, but the whole thereof with interest from the 26th day of January, 1904, at the rate of 6 per cent per annum remains unpaid. That the said dividend of \$111.00 per share on said 300 shares was paid to the said Albert Steinfeld because of and on account of his control of said corporation. That said money received by said Albert Steinfeld as such dividend on said 300 shares of stock was the money and property of said Silver Bell Copper Company, and said Albert Steinfeld had no right thereto, and had no right to receive the same and convert the same to his own use. That said dividend (except as to said 300 shares of stock standing in the name of Albert Steinfeld as trustee) was
1006 regularly declared; That R. K. Shelton was paid and received the sum of \$111.00 on such dividend, being the dividend on the one share of stock standing in his name; That said J. N. Curtis was paid and received the sum of \$18,870.00, being the dividend on 170 shares standing in his name; That said Albert Steinfeld in addition to said \$33,300.00 was paid and received the sum of \$27,639.00, being the dividend on the 249 shares standing in his name and belonging to him. That plaintiff has now been paid and has received the sum of \$27,750.00, being the dividend on 250 shares; the same being accepted by plaintiff without prejudice to this action and under agreement that the same should in no manner affect this action.

XXXIX.

That this action is prosecuted by the plaintiff above named, as a stockholder of the said defendant, the Silver Bell Copper Company, and not otherwise, and that all of the sums of money expended by him as and for costs and attorneys' fees in the prosecution of this action are expended for the benefit of the said Silver Bell Copper Company, and not for the benefit of this plaintiff, 1007 except as he is a stockholder of said corporation; That this plaintiff, in that regard, has employed as attorneys for the bringing of this action for the benefit of the Silver Bell Copper Company, Edwin A. Meserve of Los Angeles, California, and Frank H. Hereford of Tucson, Arizona, and has agreed to pay the said attorneys reasonable fees for the services rendered in this action, and which said fees and all other expenses and obligations incurred by this plaintiff, in the bringing of this action, should be paid to plaintiff, or to those to whom he is obligated therefor by the said defendant, Silver Bell Copper Company, out of the moneys which it may receive as the result of the bringing and prosecuting of this action; That ten per cent of the amount for which judgment is finally given in this action, is and will be a reasonable amount to be allowed plaintiff as a charge against said Silver Bell Copper Company, as attorneys' fees for bringing and prosecuting this action for its benefit.

XL.

That as hereinabove found, the defendants, Shelton, Curtis and Steinfeld, are the directors of said Silver Bell Copper Company; that said Curtis and Shelton are under the absolute 1008 control and dominion of said Steinfeld, and that if any moneys or properties belonging to said corporation should be returned to said corporation, the same would be still in the hands of the same parties and controlled by them and would be again placed under the control of defendant Steinfeld; that it will be unequitable and wrong that said money should again be paid to said corporation and be again placed under the control, dominion and in the custody of said Albert Steinfeld, and it is therefore meet, equitable and proper that a receiver of all of the properties, books and papers of said corporation should be appointed by this Court, in order to receive the money of said corporation and properly apply the same, and that the same further might be properly paid out, used and handled as this Court in the exercise of its discretion may hereafter order, decree and determine.

XLI.

That the \$2,000.00 paid by Steinfeld at the time of the purchase of the said 300 shares of stock was the personal money 1009 of said Steinfeld and that said Zeckendorf knew that Steinfeld had paid the same out of his personal money, for and in behalf of the corporation.

XLII.

That Selim M. Franklin at all the times herein mentioned was an attorney-at-law in active practice in the City of Tucson, and that during all of the said times and prior to the month of June, 1903, was the attorney for the said company and the said L. Zeckendorf & Company and the said Albert Steinfeld, and at no time was under the domination or influence of said Steinfeld so as to do anything in any of the transactions involved in this litigation to the advantage of said Steinfeld and against the interests of said company or the said Zeckendorf.

XLIII.

That at no time prior to about the 20th day of May, 1903, did the Nielsen Mining & Smelting Company or the Silver Bell Copper Company offer or agree to repay to Albert Steinfeld any of the several sums of money, or any part thereof, paid by him to
1010 Francis & Volkert, or to the English owners of the English group of mines, except as in these findings set forth.

XLIV.

And at no time prior to about the 20th day of May, 1903, did the said Nielsen Mining & Smelting Company or the Silver Bell Copper company agree to assume any obligation which the said Steinfeld incurred in and by the execution of said agreement of date May 16th, 1900, with Francis and Volkert.

XLV.

That all of the money expended by said Steinfeld in the purchase of the Francis and Volkert titles and the English titles to the English group of mines, was the personal money of the said Steinfeld, and that at no time did the said Steinfeld offer to loan to the said company any sums of money whatever for the purchase of either of the titles to said group of mines.

Dated this 30th day of July, 1908.

JOHN H. CAMPBELL, *Judge.*

Filed October 2, 1908.

1011 Also the following facts found by the Supreme Court of the Territory, as set forth in the opinion of the court:

The authorized capital stock of the company was Twenty-five Thousand (\$25,000.00) Dollars.

Steinfeld did not prevent the Company from purchasing the English group of mines by any representation to the officers of the Company or the Board of Directors that he intended to or would obtain the property for the Company.

The Silver Bell Copper Company went into possession of the English Group of mines after its purchase by Steinfeld, and was given by Steinfeld the right of working the same and treating any ores that might be taken from the same in the company's smelter.

Soon after the purchase by Steinfeld of the English title Curtis consulted with S. M. Franklin, the attorney for the Silver Bell Copper Company, and who was also attorney for L. Zeckendorf & Co., and the defendant Steinfeld, with regard to the ownership of the three hundred shares of stock purchased from Neilsen and the English group. Steinfeld was then claiming to be the owner of both the stock and the mines.

As a result of this action of Curtis, Franklin told Steinfeld that under the circumstances of his purchases, he held both the stock and the English group as trustee for the Silver Bell Copper Company; that because of his relation to the Company he had neither the right to purchase the stock of mines for himself, nor the right to compel the company to assume the purchases without the consent of its stockholders at a meeting at which some other than Steinfeld should vote the shares belonging to L. Zeckendorf & Co., and that if the corporation should then refuse to ratify the transactions, Steinfeld could then rightfully thereafter hold the stock and mines as his own. Acting under this advice on July 15, 1901, Steinfeld handed to Shelton, Secretary of the Company, the proposition of date July 15th, 1901, heretofore found.

During all the times that the proposition of Steinfeld was pending, the Silver Bell Copper Company was in possession of the English group, and worked and operated it in connection with the Old Boot Mine. In 1901, and at other times, Curtis, under the direction of Steinfeld, made various maps and reports of the property, in which the English group was spoken of as part of the Silver Bell Copper Company's property. These maps and reports were sent to plaintiff and others, and various efforts made by Steinfeld to sell the property as a whole, including the English group.

July 22nd, 1909.

EDWARD KENT,
Chief Justice.

1013 *Mandate of the Supreme Court of the United States to the Supreme Court of the State of Arizona, in Case No. 1101. Filed November 23, 1912.*

UNITED STATES OF AMERICA, ss:

The President of the United States of America to the Honorable the Judges of the Supreme Court of the State of Arizona, Greeting:

[SEAL.]

Whereas, lately in the Supreme Court of the Territory of Arizona, in a cause between Louis Zeckendorf, appellant, and Albert Steinfeld, et al., appellees, No. 1101, on appeal and cross-appeal, wherein the decree of the said Supreme Court, entered in said cause on the 20th day of March, A. D., 1909, is in the following words, viz:

"This cause having been heretofore submitted and by the Court

taken under advisement, and the Court having considered the same and being fully advised in the premises:

It is ordered, adjudged and decreed that the judgment of the District Court, herein appealed from, be, and the same is hereby, affirmed.

It is further ordered, adjudged and decreed that The Silver Bell Copper Company, a corporation, do have and recover of and from Albert Steinfeld, one of the appellants herein, and Epes Randolph and Leo Goldschmidt, sureties on the supersedeas bond herein, the amount of the judgment rendered in the trial court in favor of the defendant, the Silver Bell Copper Company.

It is further ordered, adjudged and decreed that Louis Zeckendorf do have and recover of and from Albert Steinfeld, one of the appellants herein, and Hugo J. Donau and L. Rosenstern, sureties on the cost bond herein, his costs in the court below in this cause incurred."

as by the inspection of the transcript of the record of the said Supreme Court, which was brought into the Supreme Court of the United States by virtue of an appeal taken by Louis Zeckendorf and a cross-appeal taken by Albert Steinfeld, J. N. Curtis, R. K. Shelton, and Silver Bell Copper Company, agreeably to the act of Congress, in such case made and provided, fully and at large appears.

And whereas, in the present term of October, in the year of our Lord one thousand nine hundred and eleven, the said cause came on to be heard before the said Supreme Court, on the said transcript of record on appeal and cross-appeal, and was argued by counsel:

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said Supreme Court in this cause in so far as it affirms the judgment of the District Court on the first cause of action be, and the same is hereby, reversed, and in so far as it affirms the judgment of the said District Court on the second cause of action be, and the same is hereby, affirmed, costs in this Court to be paid by Steinfeld, et al.; and that the said Louis Zeckendorf recover against the said Albert Steinfeld et al. Five Hundred and thirty-one dollars and thirty-seven cents for his costs herein expended and have execution therefor.

And it is further ordered that this cause be, and the same is hereby, remanded to the Supreme Court of the State of Arizona for such further proceedings as may not be inconsistent with the opinion of this Court.

June 7, 1912.

You, therefore, are hereby commanded that such execution and further proceedings be had in said cause, in conformity with the opinion and judgment of this Court, as according to right and justice, and the laws of the United States, ought to be had, the said appeals notwithstanding.

Witness the Honorable Edward D. White, Chief Justice of the United States, the 12th day of November in the year of our Lord one thousand nine hundred and twelve.

1016

Costs of Louis Zeckendorf.

Clerk	\$229.75
Printing Record	281.62
Attorney	20.00
	<hr/>
	\$531.37

JAMES H. MCKENNEY,

Clerk of the Supreme Court of the United States.

Order of the Supreme Court of the State of Arizona made and entered on to-wit: the 17th day of December, 1912, being one of the regular juridical days of said court, in words and figures following, to-wit:

No. 1101.

LOUIS ZECKENDORF, Plaintiff-Appellant,

vs.

ALBERT STEINFELD et al., Defendants-Appellees.

On motion of defendants-appellees, filed November 30, 1912, that this Court correct its record in the case on appeal to the Supreme Court of the United States and certify the same to the Supreme Court of the United States as corrected;

It is ordered that said motion be and the same is hereby denied for the reason that this Court has no jurisdiction to entertain
1017 the same.

On motion of defendants-appellees, filed December 12, 1912, that this Court consider and determine its findings of fact herein in the nature of a special verdict and further proceed to consider and determine this cause as of the time of the rendition of its judgment herein and render a new judgment in said cause.

It is ordered that said motion be and the same is hereby deenied for the reason that this Court has no jurisdiction to entertain the same.

On stipulation of the parties appellant and appellees in open court

It is ordered that the item in the Cost Bill of appellant, to-wit: "Paid W. F. Cooper, Court Stenographer transcribing testimony on first appeal as per stipulation, \$541.80, be and the same is hereby disallowed and stricken from the Cost Bill.

On objection of the defendants-appellees

It is ordered that the following items in the Cost Bill of appellant be and they are each hereby disallowed and stricken from the Cost Bill, to-wit:

"Paid premium on appeal bond in the matter of justification of sureties on first appeal.....	\$5.00
Paid printing of briefs on first appeal	20.00
Paid A. Steinfeld costs of Supreme Court on first appeal as per mandate	845.20"

But without prejudice to any action of the appellant or the lower court in the matter of said costs that may be agreeable and
1018 conform to either law or equity in the premises.

It is further ordered that the costs of appellant be disallowed in the sum of \$1412.00 and allowed in the sum of \$1702.64, and as so allowed that the same be taxed in the remittitur to the Superior Court.

Rule 12 of the Supreme Court of the State of Arizona, Approved October 7th, 1912, to Take Effect November 16th, 1912.

Rule 12.

Mandate from the United States Supreme Court.

Upon the receipt by the clerk of this court of a mandate from the Supreme Court of the United States in any cause brought to this court on appeal, or writ of error, and taken from this court by appeal, or writ of error, to said Supreme Court, it shall be the duty of said clerk, forthwith, to issue under his hand and seal of this court a remittitur to the Superior Court of the county in which the judgment was rendered, commanding such court to take such action in the premises as by the mandate shall be proper, and said remittitur shall also contain therein a recital in hæc verba of the said mandate; and all the costs subsequent to the appeal from said Superior Court shall be taxed in said remittitur.

1019

Rule 14.

These rules shall take effect from and after the 16th day of November, 1912, on which day all other rules shall be considered repealed.

Approved this 7th day of October, 1912.

ALFRED FRANKLIN, *Chief Justice.*

D. L. CUNNINGHAM, *Judge.*

HENRY D. ROSS, *Judge.*

1020 And on to-wit: the 27th day of May, 1914, came the appellants Albert Steinfeld, R. K. Shelton, J. N. Curtis and Mammoth Copper Company, a corporation, by their attorneys, and filed in the clerk's office of said Supreme Court of the State of Arizona in said entitled cause, No. 1347, a certain Præcipe in words and figures following, to-wit:

In the Supreme Court of the United States.

ALBERT STEINFELD, R. K. SHELTON, J. N. CURTIS, and MAMMOTH
COPPER COMPANY, a Corporation, Defendants-Appellants,

vs.

LOUIS ZECKENDORF, Plaintiff; HIRAM W. FENNER, Receiver, Ap-
pellees.

Præcipe.

Notice to the Clerk to Send Papers to the Supreme Court.

To the Clerk of the Supreme Court of the State of Arizona:

You are hereby notified and directed Pursuant to the 8th rule of the rules of the Supreme Court of the United States to incorporate in the transcript of the record in the above entitled appeal the following portions of the record:

1. The petition for allowance of an appeal to the Supreme Court of the United States, and the allowance thereof.

2. Citation.

3. Admission of service thereof.

4. Assignment of errors.

5. The bond on appeal for costs and as a supersedeas with the approval thereof.

6. This præcipe with admission of service thereof.

7. Mandate of the Supreme Court of the United States to the Supreme Court of the State of Arizona.

8. Minute entries of the Supreme Court of the State of Arizona.

9. Mandate of the Supreme Court of the State of Arizona to the Superior Court of Pima County.

10. The minute entries of the Supreme Court of the State of Arizona including all orders, judgments and rulings of record of said Supreme Court.

11. The minute entries of the Superior Court of Pima County.

12. A certified copy of rule 12 of the Supreme Court of the State of Arizona, together with a certificate by you that it has been in force continuously since statehood.

13. The assignment of errors made in the brief of appellant upon the appeal from the judgment and orders of the Superior Court.

14. Petition for a re-hearing.

15. The Third Amended Complaint filed on January 4, 1908.

16. The Answer to the Third Amended Complaint filed January 6, 1908.

17. Stipulation dated Tucson, Arizona, and filed January 7, 1908.

18. The Findings of Fact made by the trial court upon the first trial and dated September 16, 1905.

1922 19. The judgment made upon the first trial rendered September 16, 1905.

20. The Findings of Fact upon the second trial made July 30, 1908, and filed October 2, 1908.

21. The judgment of the trial court rendered July 30, 1908.
22. The additional findings made by the Supreme Court of the Territory of Arizona signed by Edward Kent, Chief Justice, July 22, 1909.
23. Affidavit for change of venue filed March 1, 1913.
24. Objections of plaintiff to change of venue filed March 1, 1913.
24. Affidavit of Frank H. Hereford in opposition to change of venue filed March 1, 1913.
25. Amended motion for judgment or decree filed March 1, 1913.
26. Motion for an order fixing the amount of the bond of the receiver and requiring said receiver to proceed with the performance of his duties as ordered in the judgment of July 30, 1908, which said motion was filed February 6, 1913.
27. Exceptions by defendant to motions for judgment filed March 13, 1913.
28. Additional exceptions filed by defendant May 13, 1913.
29. Additional exceptions and objections to motion for judgment filed July 1, 1913.
30. Judgment of Superior Court dated and filed July 1, 1913.
31. Affidavit of Albert Steinfeld filed August 7, 1913.
32. Motion to set aside judgment filed June 25, 1913.
33. Motion to modify judgment filed June 25, 1913.
34. Motion to modify judgment and discharge receiver 1023 filed June 28, 1913.
35. Reporter's transcript of evidence of proceedings on June 16 and 17 and July 1, 1913. (This has reference to the transcript of the reporter's notes which was filed on the 14th day of July, 1913, and thereafter certified to as correct by the Judge who tried the case.)
36. Opinion Supreme Court of the State of Arizona.
37. Motion for a new trial filed June 25, 1913.
38. Opinions and judgments of the Supreme Court of the Territory of Arizona on both appeals.
39. The assignments of error made by the defendants-appellants with respect to the first cause of action on the first appeal to the Supreme Court of the Territory of Arizona as the same appear in the brief of said defendants-appellants upon said appeal, together with the opening paragraph of the supplemental brief filed by Francis J. Heney upon the said first appeal.
40. The assignments of error as the same appear in the briefs of the respective parties of each side upon the controversy upon the second appeal to the Supreme Court of the Territory of Arizona.
41. That part of the minute entries of the District Court of Pima County of the 6th day of January, 1908, reading as follows:

"This case came on this day regularly for trial before the court sitting without a jury, a trial by jury having been in open court expressly waived by the respective parties hereto, Edwin A. Meserve, Esq., and Frank H. Hereford, Esq., appearing as counsel for the plaintiff, and Francis J. Heney, Esq., and Eugene S. Ives, Esq., for the defendants, and both parties announce ready for trial. Whereupon, by request and consent of counsel for the respective parties

hereto, it is ordered that the record of the evidence, admissions and stipulations in the former trial of this case shall constitute the record at this trial, together with such papers as have been filed by the respective parties hereto, and the plaintiff then rested his case. The defendants then rested their case.

Dated Tucson, Arizona, May 25, 1914.

1024

FRANCIS J. HENEY,
EUGENE S. IVES,
S. L. KINGAN,

Attorneys for Defendants-Appellants.

I hereby admit service of the foregoing notice to have been made upon me as attorney for the plaintiff-appellee this 25th day of May, 1914.

FRANK H. HEREFORD,
A. H. M.,

Attorney for Plaintiff-Appellee.

I hereby admit service of the foregoing notice to have been made upon me as attorney for the receiver-appellee this 25 day of May, 1914.

SELIM M. FRANKLIN,
Attorney for Plaintiff-Appellee.

1025 And on to-wit: the 1st day of June, 1914, came the plaintiff-appellee, Louis Zeckendorf, by his attorney, and filed in the clerk's office of said Supreme Court of the State of Arizona in said entitled cause, No. 1347, his objections to præcipe, in words and figures following, to-wit:

In the Supreme Court of the United States.

ALBERT STEINFELD, R. K. SHELTON, J. N. CURTIS, and MAMMOTH COPPER COMPANY, a Corporation, Defendants-Appellants,

vs.

LOUIS ZECKENDORF, Plaintiff, and HIRAM W. FENNER, Receiver, Appellees.

Objections to Præcipe.

To the Honorable Supreme Court of the State of Arizona:

Louis Zeckendorf, Plaintiff-Appellee herein, makes the following objections to the præcipe addressed by Defendants-Appellants herein to the Supreme Court of the State of Arizona, dated May 25th, 1914. In making the objections, the number set opposite each part of the record referred to in said præcipe will be used instead of citing the full name and description of it.

1. Objects to No. 4 for the reason that so far as this Plaintiff-Appellee knows, no such assignment has been filed, and none

1026 has been served upon this Plaintiff-Appellee.

2. Objects to No. 7, No. 15, No. 16, No. 17, No. 21, and

No. 22 and No. 38 for the reason that all of the documents referred to were before the Supreme Court of the United States on the appeal of this case to that Court, and are matters of record there, and that by incorporating them into a new transcript, it incumbers the records, adds additional and unnecessary costs and violates rule 76 of "Rules of Practice for the Courts of Equity of the United States."

3. Objects to the inclusion of No. 14 for the reason that a petition for rehearing in a matter of this character is not a proper part of the transcript of the record on appeal to the Supreme Court of the United States; it incumbers the record and adds to the cost.

4. Objects to No. 18, No. 19, No. 20, No. 39, No. 40, and 41 for the reason that the said records and all matters relating to them are records and transactions occurring before the rendition of the judgment and decree of the Supreme Court of the United States in this case, and were each and all considered by the Supreme Court of the United States when the first appeal in this matter was before it.

That they can be of no value in this matter, except for the purpose of seeking to obtain a new trial in the Supreme

1027 Court of the United States; that the time for applying for new trial in the Supreme Court of the United States has expired, and on other assertions and rules of the Supreme Court of the United States, neither it nor any other court has power to consider application for new trial or to grant a new trial in this matter. That the records referred to in said numbers in said *Præcipe* incumber the record and add unnecessary costs, and that if any part of the record made in this case before the hearing before the Supreme Court of the United States are material and relevant in this action, the whole record is material and relevant, and should be incorporated in the present transcript asked for for use in the Supreme Court of the United States.

5. Objects to No. 35 on the grounds that the said so-called reporter's transcript of evidence was not a transcript of evidence: No proper part of the record in this case, and was simply a transcript of the discussions and arguments before and with the Judge of the Superior Court at the time judgment and decree in this case was asked of the Superior Court and by it rendered.

Respectfully submitted,

FRANK H. HEREFORD,

Attorney for Louis Zeckendorf, Plaintiff-Appellee.

Service of copy admitted this 30th day of May, 1914.

EUGENE S. IVES,

Att'y for Def'ts-App'ls.

1028 *Motion for Judgment and Decree, Filed in the Superior Court of Pima County, February 6, 1913.*

In the Superior Court of the State of Arizona in and for the County of Pima.

LOUIS ZECKENDORF, Plaintiff,

vs.

ALBERT STEINFELD, R. K. SHELTON, J. N. CURTIS, SILVER BELL Copper Company, a Corporation; Mammoth Copper Company, a Corporation, Defendants.

Notice of Motion.

To Albert Steinfeld, R. K. Shelton, J. N. Curtis, The Silver Bell Copper Company, a corporation; The Mammoth Copper Company, a corporation, and to their attorneys, Honorables Eugene S. Ives and Frank J. Heney, Notice:

Notice is hereby given that the above and foregoing motion will be made in the above entitled court on the 13th day of February, 1913, at 10 o'clock, A. M. of said date.

E. A. MESERVE,

FRANK H. HEREFORD,

Attorneys for Plaintiff.

1029 In the Superior Court of the State of Arizona in and for the County of Pima.

LOUIS ZECKENDORF, Plaintiff,

vs.

ALBERT STEINFELD, R. K. SHELTON, J. N. CURTIS, SILVER BELL Copper Company, a Corporation; Mammoth Copper Company, a Corporation, Defendants.

Motion for Judgment and Decree.

Now comes Louis Zeckendorf, the plaintiff in the above entitled action, and moves this Honorable Court as follows, to-wit:

Whereas heretofore, and on July 30, 1908, the District Court of the First Judicial District of the Territory of Arizona in and for the County of Pima, in the above entitled case of Louis Zeckendorf, plaintiff, vs. Albert Steinfeld, R. K. Shelton, J. N. Curtis, Silver Bell Copper Company, a corporation, Mammoth Copper Company, a corporation, defendants; entered and docketed a certain judgment and decree which was in the words and figures following, to-wit:

"This cause came on regularly for trial before the Court, Honorable John H. Campbell, Judge thereof, presiding, sitting without a jury, (a jury having been theretofore regularly waived by all parties) on the 2nd day of January, 1908, all parties being present in

person, and also by their attorneys; evidence, oral and documentary, having been regularly introduced and offered by the respective parties and received by the Court, the cause was in regular order and in due course and form argued to the Court, and submitted to it for its decision; after due consideration of the pleadings and of 1030 all admitted evidence in the case, and being fully advised in the premises, wherefore by virtue of the law and the premises aforesaid, it is hereby ordered, adjudged and decreed:

First. That the plaintiff recover nothing upon the first cause of action in the complaint set forth, and as to the said first cause of action the defendants go hence without day.

Second. That Albert Steinfeld upon the second cause of action in said complaint set forth, pay to the defendant the Silver Bell Copper Company, and that the said Silver Bell Copper Company do have and recover from said Albert Steinfeld, the sum of \$20,850, with interest thereon at the rate of six per cent per annum from the 20th day of January, 1904; that plaintiff do have execution for the said sum of \$20,850.00, and interest thereon from said date against the said Albert Steinfeld, the recoveries on said execution to be paid to the defendant the Silver Bell Copper Company or to the receiver of said company to be appointed as in this judgment provided.

Third. That L. Zeckendorf, plaintiff in the above entitled action, do have and recover of and from Albert Steinfeld his, plaintiff's costs in this action, herein taxed at the sum of \$662.60, and that plaintiff do have execution in his favor and against said defendant therefor.

Fourth. That plaintiff, out of the said money recovered and to be recovered by said Silver Bell Copper Company from the said Albert Steinfeld, do have and recover of and from the said Silver Bell Copper Company, and be paid by the said Silver Bell Copper Company, the sum of \$2,652.50 as and for attorney's fees for the bringing of this action and the prosecution of the same up to and including the entry of this judgment; and it is further ordered that the receiver hereafter to be appointed herein and hereafter named, do pay to said plaintiff the said sum of \$2,652.50 out of the said moneys to be recovered by said Silver Bell Copper Company from the said Albert Steinfeld.

It is further ordered, adjudged and decreed, and the Court does hereby order that Hiram W. Fenner be, and he is, hereby appointed receiver of all property, money, book and assets of any kind or character of or belonging to the said Silver Bell Copper Company and any person or persons having any money or assets belonging to the said Silver Bell Copper Company are hereby ordered to turn 1031 over and deliver the same to the said receiver, the same to be held by the said receiver and retained and kept in possession, and to be distributed, paid out and disbursed upon the orders of the Court to be made from time to time in this action; said receiver to execute the usual oath of office and to give and execute bond in the sum of \$—— in the usual form of receiver's bond, to be approved by this Court, for the faithful performance by him of his duties, as receiver; and the said Hiram W. Fenner as such receiver, imme-

diately upon the filing of his oath and the approval of his bond, as aforesaid, is hereby ordered and directed to take immediate possession of all the moneys, property and other assets of the said Silver Bell Copper Company, and to hold and disburse the same in accordance with the orders and judgment herein contained, and in accordance with the orders to be made by this Court from time to time hereafter.

It is further ordered, adjudged and decreed that upon the final termination of this action, the said Silver Bell Copper Company shall be dissolved, and that thereupon all its debts and liabilities shall then be paid and discharged, and thereupon all property, money and assets of such corporation then remaining shall be distributed among its stockholders in the proportions of their several ownership of stock.

The said dissolution, payments, disbursements, and distributions to be done and accomplished by orders of this Court for that purpose in this action made and to be made.

It is further ordered, adjudged and decreed that Albert Steinfeld holds the sum of \$25,750 money of said Silver Bell Copper Company in his hands as and for security to him in the action of Franklin vs. Silver Bell Copper Company, said Steinfeld to account to said corporation or to the receiver of said corporation hereafter appointed for said sum immediately upon the final determination and settlement of this action, and to pay the said Silver Bell Copper Company or to such receiver the balance of said sum, if any, after deducting therefrom such sums, if any, that said Steinfeld may properly and in accordance with law pay or have paid for the benefit of the said Silver Bell Copper Company.

Done in open court this 30th day of July, 1908.

JOHN H. CAMPBELL, *Judge.*

Filed October 4, 1908."

1032 And whereas, thereafter and in due time and in due form, the plaintiff in said action appealed to the Supreme Court of the Territory of Arizona from such judgment, and the defendants in said action on the same day that plaintiff's appeal was taken, and in due form, appealed to the Supreme Court of the Territory of Arizona, from said judgment; and thereafter said cross-appeals from said judgment were duly perfected, and the record thereof made before the Supreme Court of the Territory in the manner provided by law, and the rules of said court, and thereafter said appeals came on regularly for hearing before said court, whereupon and on the 20th day of March, 1909, by opinion and decision duly filed in said court, the said Supreme Court of the Territory affirmed said judgment and gave judgment that the Silver Bell Copper Company, a corporation, do have and recover of and from Albert Steinfeld, one of the appellants, and Epes Randolph and Leo Goldschmidt, his bondsmen on appeal, the amount of the judgment rendered in the trial court in favor of the defendant, the Silver Bell Copper Company, as above specified, and that Louis Zeckendorf, the plaintiff, do have and recover of and from Albert Steinfeld, one of the appel-

lants, and Hugo J. Donau and L. Rosenstern, sureties on the appeal bond, his, plaintiff's costs in the court below, in this cause incurred; and thereafter, and in due course, on the 1st day of May, 1033 1909, being one of the regular judicial days of the January term of said Supreme Court, Louis Zeckendorf, as appellant, in open court, gave notice of his appeal to the Supreme Court of the United States from the judgment of said court, and the said plaintiff thereupon thereby appealed to said Supreme Court of the United States from said judgment of the Supreme Court of the Territory of Arizona, and on the same day the defendants gave notice of a cross-appeal to the Supreme Court of the United States from the said judgment of the Supreme Court of the Territory of Arizona, and both the plaintiff and the defendants, in the form required by law, gave notice of appeal and application for appeal, and gave the required bonds on appeal, to the Supreme Court of the United States from said judgment; and thereafter, the said cause was regularly docketed in the Supreme Court of the United States on the October term, 1911, of said court, the appeal by Louis Zeckendorf, plaintiff, being entitled as follows, on the files of said October Term of said Supreme Court of the United States, viz: "No. 139. Louis Zeckendorf, appellant, vs. Albert Steinfeld, J. N. Curtis, R. K. Shelton, et al." and the appeals of the defendants being entitled on said term of court as follows: "No. 140. Albert Steinfeld, J. N. Curtis, R. K. Shelton, et al., appellants, vs. Louis Zeckendorf and Silver Bell Copper Company."

1034 And thereafter, and in due course, said appeals were perfected, and the record thereon made in the manner required by law, to the Supreme Court of the United States: Whereupon, and on the 15th day of March, 1912, both said appeals were argued to the Supreme Court of the United States by the respective counsel for the parties to said appeals, and said appeals were regularly submitted to the Supreme Court of the United States for its decision, whereupon, and on the 7th day of June, 1912, the said Supreme Court of the United States duly made, gave and rendered its judgment in said cause, and on said appeals, wherein and whereby it ordered judgment in accordance with the opinion that it rendered, and as shown by the mandate of said court to the Supreme Court of the State; and whereas, on the 23rd day of November, 1912, the mandate from the Supreme Court of the United States on said appeals in said cause was regularly issued to and came down to the Supreme Court of Arizona, and was received by said court and filed therein and in said matter, commanding said court to cause judgment to be entered in this cause, in accordance with the decision and opinion of said Supreme Court of the United States, accompanying said mandate; that thereafter, and in accordance with the law and the rules and practices of said Supreme Court of Arizona, said court, on the 3 day of February, 1913, issued its mandate to this court, directing that judgment of 1035 this court be made, given and entered in this cause, in accordance with said mandate of the Supreme Court of the United States, and in accordance with its decision and opinion.

Plaintiff moves this Honorable Court for a judgment and decree in the above entitled action in accordance with the said mandates of the Supreme Court of the United States, and the Supreme Court of the State of Arizona, in the following language, or to the following effect:

"The motion of Louis Zeckendorf, plaintiff herein, that this court enter its judgment and decree in this case, in accordance with the mandates of the Supreme Court of the United States, and the Supreme Court of the State of Arizona coming on regularly to be heard, the plaintiff being present and represented by his attorneys Honorables E. A. Meserve and Frank H. Herford, and the defendants being present and represented by their attorneys Honorables Eugene S. Ives and Francis J. Heney, and the matter having been argued and submitted to this court for its decision, and the court being fully advised in the matter, does grant the said motion; and as it appears that this cause came on regularly for trial before the District Court of the First Judicial District, Territory of Arizona, County of Pima, Honorable John H. Campbell, Judge thereof presiding, (a jury having been theretofore regularly waived by all parties), on the 2d day of January, 1908, all parties being present in person and also by their attorneys, evidence oral and documentary having regularly been introduced and offered by the respective parties and received by the court, and the cause having been in regular order and in due course and fully argued to the court and submitted to it for its decision, and after due consideration of the pleadings and of all admitted evidence in the case, and after being fully advised in the premises, and under and by virtue of the law and the premises aforesaid, the court having regularly entered its judgment and decree in said case; and as it further appears that appeals by both plaintiff and defendant were taken in due order and time from the said judgment and decree to the Supreme Court of the Territory of Arizona, which in due course and time rendered its judgment and decree affirming the judgment and decree entered by the Lower court, and that, thereafter in due course and time, appeals were taken by all parties to the Supreme Court of the United States, from the judgment and decree of the Supreme Court of the Territory of Arizona; and as it further appears that thereafter and in due course and time the Supreme Court of the United States approved and affirmed so much of the said judgment rendered by the Lower Court, as related to the second cause of action in plaintiff's complaint set forth, and reversed and remanded for further proceedings not inconsistent with the opinion of the Supreme Court of the United States, so much of said judgment, and all matters connected therewith, as related to the first cause of action, in plaintiff's complaint set forth; and as it further appears from the mandates of the Supreme Court of the United States and the Supreme Court of the State of Arizona, that this court is required to enter such judgment and decree and take such further action as is necessary to effectuate and enforce the mandates of said Supreme Courts of the United States, and of

the State of Arizona, and in accordance with the views expressed in the decision rendered by the Supreme Court of the United States in this matter.

Now Therefore, it is ordered, adjudged and decreed: First. That Hiram W. Fenner be, and he is, hereby appointed receiver of all property, money, books and assets of any kind or character, of or belonging to the said Silver Bell Copper Company, and any person and all persons having any books, money, property or assets belonging to the said Silver Bell Copper Company are hereby ordered to turn over and deliver the same to the said receiver. That the said receiver hold, retain and keep the same in possession to be distributed, disposed of, paid out and disbursed upon the order of this court, to be made from time to time in this action; that the said receiver execute the usual oath of office and give and execute a bond in the sum of — Dollars, in the usual form
1038 of a receiver's bond, to be approved by this court, for the faithful performance by him, of his duties as receiver, and the said Hiram W. Fenner as such receiver, immediately upon the filing of his oath and the approval of his bond as aforesaid, is hereby ordered and directed to take immediate possession of all the moneys, property, books, papers and other assets of the said Silver Bell Copper Company, and to hold, dispose of and disburse the same in accordance with the orders and judgment herein contained, and in accordance with the orders to be made by this court from time to time hereafter.

Second. That Albert Steinfeld upon the first cause of action set forth in plaintiff's complaint herein, pay to Hiram W. Fenner as Receiver of the Silver Bell Copper Company, and for and on behalf of, and as the property of the Silver Bell Copper Company, the sum of One Hundred twenty-seven Thousand, Six Hundred twenty-six dollars and seventy-five cents, (being the amount of One Hundred forty-five Thousand Seven Hundred forty-three Dollars and seventy-five cents, less the sum of Eighteen Thousand, One Hundred Seventeen Dollars), together with interest thereon at the rate of six (6) per cent per annum from January 16, 1904, to date, viz: February 16, 1913, said interest amounting to Sixty-nine Thousand Five Hundred fifty-six Dollars and fifty-
1039 seven cents, making a total at this date, principal and interest of One Hundred Ninety-seven Thousand, One Hundred Eighty-three Dollars and thirty-two cents; and that the said Silver Bell Copper Company have judgment against the said Albert Steinfeld for said sum of One Hundred Ninety-seven Thousand, One Hundred Eighty-three Dollars and thirty-two cents.

Third. That Albert Steinfeld upon the first cause of action in said complaint set forth, pay to Hiram W. Fenner, the Receiver of the said Silver Bell Copper Company for and on behalf of, and as the property of the said Silver Bell Copper Company, the further sum of One Hundred Thousand Dollars, together with interest, thereon at the rate of six (6) per cent from May 20, 1903, to date, viz: February 16, 1913, said interest amounting to Fifty-eight Thousand, Four Hundred ninety-three dollars, and making a total

amount at this date, principal and interest, of One Hundred fifty-eight Thousand Four Hundred ninety-three dollars; and that the said Silver Bell Copper Company have judgment against the said Albert Steinfeld for the said sum of One Hundred fifty-eight Thousand, Four hundred ninety-three dollars.

Fourth. That the said Albert Steinfeld upon the first cause of action in said complaint set forth, pay to the said Hiram W. Fenner, receiver of the said Silver Bell Copper Company as said receiver, for and on behalf of, and as the property of the said Silver Bell Copper Company, the further sum of Twenty-five Thousand Seven Hundred fifty-Dollars, together with interest thereon from January 16, 1904, to date, viz: February 16, 1913, at six (6) per cent per annum; amounting to the sum of Fourteen Thousand, Thirty-three Dollars and seventy-five cents, said principal and interest amounting all told, this 13th day of February, 1913, to Thirty-nine Thousand, Seven Hundred eighty-three dollars and seventy-five cents; and that the Silver Bell Copper Company do have judgment against the said Albert Steinfeld for the said sum of Thirty-nine Thousand, Seven Hundred eighty-three Dollars and seventy-five cents.

Fifth. That the said Albert Steinfeld, and his bondsmen on appeal, Epes Randolph, Leo Goldschmidt, George Pusch and Fred Fleishman, upon the second cause of action in said complaint set forth, pay to Hiram W. Fenner, the receiver of the Silver Bell Copper Company, for and on behalf of, and as the property of the said Silver Bell Copper Company the —, and that the said Silver Bell Copper Company do have judgment against the said Albert Steinfeld, Epes Randolph, Leo Goldschmidt, George Pusch and Fred Fleishman, for the further sum of Twenty Thousand, Eight Hundred Fifty Dollars, with interest thereon at the rate of six (6) per cent per annum, from the 20th day of January, 1904, to date, viz: the 13th day of February, 1913; amounting to Eleven Thousand Three Hundred sixty-three Dollars and twenty-five cents, said principal and interest together amounting this date to Thirty-two Thousand, Two Hundred thirteen dollars and twenty-five cents.

Sixth. That the said Albert Steinfeld and Hugo J. Donau and L. Rosenstern, pay to Louis Zeckendorf, plaintiff in the above entitled action, and that the said Louis Zeckendorf do have and recover of and from the said Albert Steinfeld, Hugo J. Donau and L. Rosenstern, plaintiff's costs heretofore taxed and allowed in the said judgment of July 30, 1908, at the sum of Six Hundred sixty-two dollars and sixty cents, together with interest thereon at the rate of six (6) per cent per annum from the 30th day of July, 1908, amounting to One Hundred and Eighty and fifty-five hundredth- Dollars, the said interest and principal amounting to the sum of Eight Hundred and forty-three and fifteen hundredth- Dollars, and that plaintiff do have execution in his favor and against said defendant Albert Steinfeld, and the sureties on his said cost bond, viz., Hugo J. Donau and L. Rosenstern.

Seventh. That Louis Zeckendorf, Plaintiff in the above entitled

action, do have and recover of and from Albert Steinfeld and George Pusch and Fred Fleishman, his, plaintiff's costs, on 1042 appeal from the Supreme Court of the State of Arizona, to the Supreme Court of the United States, amounting to Seventeen Hundred and two and 64/100 Dollars. Together with interest thereon from the — day of —, 191—, at the rate of six per cent per annum, amounting to — Dollars, and that plaintiff do have execution in his favor and against the said defendant Albert Steinfeld, and the said George Pusch and Fred Fleishman, the securities of the said Steinfeld on appeal as aforesaid.

Eighth. That plaintiff out of said money recovered, and to be recovered by said Silver Bell Copper Company, from said Albert Steinfeld, do have and recover of and from said Silver Bell Copper Company and the receiver of said company; and the receiver of said company is hereby authorized and directed to pay to said plaintiff, as and for attorneys' fees to Honorables E. A. Meserve and Frank H. Hereford, for the bringing of this action, and the prosecution of the same, up to and including the entry of the judgment of July 30, 1908, the sum of Two Thousand, Six Hundred forty-two dollars and fifty cents, together with interest thereon from the said 30th day of July, 1908, to date, viz: February 13, 1913, at the rate of six (6) per cent per annum, which interest amounts to Seven Hundred and twenty-two and eighty hundredths Dollars; and which principal and interest together amount to the sum of Thirty-three Hundred 1043 and Seventy-five and thirty hundredth- dollars.

Ninth. That plaintiff out of the said moneys recovered and to be recovered by Silver Bell Copper Company, from the said Albert Steinfeld, do have and recover of and from the said Silver Bell Copper Company and the receiver of the said Silver Bell Copper Company is hereby authorized and directed to pay to plaintiff as additional attorneys' fees for Honorables E. A. Meserve and Frank H. Hereford for bringing this action, and the prosecution of same up to and including the entry of this judgment, the sum of Thirty-nine Thousand Five Hundred and forty-six Dollars.

Tenth. That the said Hiram W. Fenner as receiver, and out of the moneys which may be paid to him by the said Albert Steinfeld, and which shall be recovered from said Steinfeld or his bondsmen in this action, shall pay to Louis Zeckendorf, plaintiff herein, in addition to the attorneys' fees and court costs hereinbefore ordered to be paid, all costs, expenses and obligations incurred by the said plaintiff in this litigation, and not herein otherwise allowed; after an account of same had been presented, audited and approved by this court.

Eleventh. That the said Hiram W. Fenner as said receiver out of the moneys which may be paid to him by the said Albert Steinfeld, and which shall be recovered from said Steinfeld in this 1044 action, shall pay to said Albert Steinfeld all sums of money heretofore necessarily paid by the said Steinfeld for and on account of the said Silver Bell Copper Company, after an account of the same has been presented, audited and approved by this court; that upon the final termination of this action, the said Silver Bell

Copper Company shall be dissolved, and that thereupon all its debts and liabilities remaining unpaid, shall then, under the direction of this court, be paid and discharged, and all of its property, money and assets then remaining, shall, under the direction of this court, be distributed amongst its stockholders, in the proportion of their several ownerships of stock; that said dissolution payment, disbursements and distributions, are to be made, done and accomplished by orders of this court, for that purpose, in this action made, and to be made.

Twelfth. That the said Louis Zeckendorf, plaintiff in this action, be granted the processes of this court for the recovery of all and every part of this judgment and order in his favor, and that execution do issue out of and from this Court, against the property of the said Albert Steinfeld, for the recovery of all of the amounts, together with interest and costs, so found due, from the said Albert Steinfeld, and the said Steinfeld and his bondsmen to the said Louis Zeckendorf and herein ordered to be paid. That the said Hiram

1045 W. Fenner, receiver, be granted the processes of this court for the recovery of all and every part of this judgment, and order to which he or the Silver Bell Copper Company is entitled, and that execution do issue out of this court against the property of the said Albert Steinfeld, and the said Albert Steinfeld and his bondsmen for the recovery of all said amounts, together with interest and costs so found due, by the said Albert Steinfeld, or the said Steinfeld and his bondsmen, to the said Silver Bell Copper Company and Hiram W. Fenner, the receiver of said Company, and herein ordered to be paid. That this judgment bear interest upon all amounts found due from this date, until paid, at the rate of six per cent per annum.

Done in open court this — day of —, 1913.

— —, Judge.

E. A. MESERVE,

FRANK H. HEREFORD,

Att'ys for Pl'ff.

(Filed February 6, 1913.)

1046 And on to-wit: the twenty-second day of October, 1913, came the appellee by his attorneys and filed in the Clerk's office of said Supreme Court in said entitled cause, his certain Motion to Dismiss Appeals, in words and figures following, to-wit:

In the Supreme Court, State of Arizona.

LOUIS ZECKENDORF, Plaintiff-Appellee,

vs.

ALBERT STEINFELD, R. K. SHELTON, J. N. CURTIS, SILVER BELL Copper Company, a Corporation, and the Mammoth Copper Company, a Corporation, Defendants-Appellants.

Notice of Motion.

To Albert Steinfeld, R. K. Shelton, J. N. Curtis, Silver Bell Copper Company, a corporation, and the Mammoth Copper Company, a corporation, Defendants - Appellants, and to Honorables S. L. Kingan, Francis J. Heney, and Eugene S. Ives, their attorneys:

You are hereby notified that the Plaintiff-Appellee will move to dismiss the appeals of the Defendants-Appellants, and each
1047 and all thereof, in the Supreme Court of the State of Arizona, in the above entitled action on the 3rd day of November, 1913, at 10 A. M. of said date, or as soon thereafter as the same can be heard, and copy of said motion and grounds therefor is hereto attached.

Dated Tucson, Arizona, October 21st, 1913.

FRANK H. HEREFORD,

E. A. MESERVE,

Attorneys for Plaintiff-Appellee.

Title of Court and Cause.

Motion to Dismiss Appeals.

Now comes the Plaintiff-appellee and moves to dismiss the appeals and each thereof of the Defendant-appellants herein on the grounds that this court has no jurisdiction to entertain or hear said appeals for the following reasons:

There are two bonds on appeal given by the Defendants-appellants, one being intended apparently to appeal from judgments rendered on the first cause of action, and the other from the judgments rendered on the second cause of action.

1. It is apparent from reading both these appeal bonds that no judgment or decree of any kind or character was rendered against R. K. Shelton, J. N. Curtis or the Mammoth Copper Company; wherefore neither the said R. K. Shelton, J. N. Curtis nor
1048 the Mammoth Copper Company or either of them, have any right to appeal from the said judgments and decrees, or any of them, or any parts of any of them.

2. That it appears from the bond on appeal from the judgments and decrees rendered upon the second cause of action the said judgments and decrees were rendered against Albert Steinfeld, Epes Randolph, Leo Goldschmidt, George Pusch and Fred Fleishman;

that it is apparent from the reading of said appeal bond on the appeal from the said second cause of action that neither the said Epes Randolph, Leo Goldschmidt, George Pusch, nor Fred Fleishman joined in said appeal or filed any appeal bond, and as to the said Epes Randolph, Leo Goldschmidt, George Pusch and Fred Fleishman no appeal has been taken. That it would be unconscionable to permit the said Albert Steinfeld to appeal from the said judgment without joining with him in said appeal his bondsmen on appeal, viz., the said Epes Randolph, Leo Goldschmidt, George Pusch and Fred Fleishman equally bound with him in said judgment from which the appeal is attempted to be taken, by reason of which fact this court has no jurisdiction to hear or determine the appeal of said Albert Steinfeld upon said second cause of action.

3. That neither the said Epes Randolph, Leo Goldschmidt, George Pusch or Fred Fleishman ever gave notice of appeal from the said judgment upon the said second cause of action; that
1049 their time for giving notice of appeal has expired, whereby they have no right to give such notice of appeal or file any new or additional appeal bond. That it would be unconscionable to permit said Albert Steinfeld, under such circumstances, to file any new or additional appeal bond in said matter.

The judgment from which the said appeal in the said second cause of action was attempted to be taken by the said Defendants-appellants and each thereof, is entered in accordance with the decree of the Supreme Court of the United States of America, and the mandate of that court and the mandate of this court upon the coming down of a former appeal in this action wherein the said judgment on the second cause of action was affirmed.

4. That by the original judgment entered in this case by the lower court it was decreed that the Silver Bell Copper Company, the defendant-appellant for whose benefit this action was brought, should be dissolved, and that Hiram W. Fenner be appointed a receiver for the said Silver Bell Copper Company, and that he take into his possession and control all the property and assets of every kind and character of the said corporation. That upon the first appeal of this case from the judgment of the lower court, this decree and judgment dissolving the Silver Bell Copper Company and ap-
1050 pointing Hiram W. Fenner its receiver with the authority as aforesaid, was affirmed by the Supreme Court of the Territory of Arizona. That upon an appeal from the said action of the Supreme Court of the Territory of Arizona to the Supreme Court of the United States, the action of the Supreme Court of the Territory of Arizona and of the lower court in the above respects, was affirmed. That thereafter and in due course, the lower court complying with the mandates of the Supreme Court of the United States, and the Supreme Court of the State of Arizona confirming the judgment and decree in the particular above set forth, entered the judgments in that respect set out in said appeal bonds and Hiram W. Fenner thereupon on the 30 day of June, 1913, duly qualified as such receiver, and has ever since been the receiver as aforesaid of the said Silver Bell Copper Company; that thereafter and on the 12th day of

August, 1913, notice of appeal was given on behalf of certain of the Defendants-appellants herein, but no notice of appeal was ever given by the said Silver Bell Copper Company for the following reasons.

That at no time after the rendition of the judgment appealed from did Albert Steinfeld, R. K. Shelton and J. N. Curtis as individuals or officers of said corporation nor did the attorneys for the said Albert Steinfeld, R. K. Shelton and J. N. Curtis, or any of them, have power or authority to give any notice of appeal in said
1051 case for or on behalf of the said Silver Bell Copper Company nor did any of the said persons have any right to make, execute or deliver or to cause any one to make, execute or deliver either or any of the bonds on appeal herein. That from and after the rendition of said judgment by said lower court upon both of the causes of action the said Silver Bell Copper Company and each and all of its agents and attorneys were deprived of any right to act for the said Silver Bell Copper Company in this case and none of them had any power or authority to make or execute any document of any kind imposing a liability present or prospective upon the Silver Bell Copper Company or any of its property or effects of any kind or character. And that the said notice of appeal and said bond on appeal insofar as the same relates to the said Silver Bell Copper Company is and are void and of no effect.

That the said bonds on appeal and each thereof show the said Silver Bell Copper Company to be one of the obligors in said bonds and one of the obligees in each of said bonds; in other words the said bonds are bonds given by the Silver Bell Copper Company to itself.

That it appears from said bonds the judgments rendered by the lower court are all in favor of the Silver Bell Copper Company for which reason the said Silver Bell Copper Company has no right to appeal therefrom. That as appears from the said bonds on
1052 appeal the only parts of the said judgment and decree that it might be contended are against the said Silver Bell Copper Company are orders made by said lower court to its receiver Hiram W. Fenner to pay certain sums of money when and after the judgments proper have been satisfied by the execution of the judgments therein given against Albert Steinfeld. That at the time this appeal was attempted to be taken there was no appeal from such orders until the final judgment and decree in this action dissolving the corporation and approving the division of its assets amongst its stockholders was entered. That the new laws of the State of Arizona permitting appeals from certain orders did not go into effect until after the time for appealing in this case had elapsed. Wherefore, the Silver Bell Copper Company neither had any right of appeal from the said judgments and decrees, nor did it by anyone thereunto authorized give any notice of appeal or file any bond on appeal, and that no authority was asked of or given by the lower court for anyone to give such notice of appeal or file any such appeal bond.

That the judgment and decree from which these appeals are taken was in all respects the judgment and decree of the Supreme Court of the United States in this matter entered in accordance with the mandate of the Supreme Court of the United States and the Supreme

053 Court of this State whereby this court has no jurisdiction to entertain said appeals or any thereof insofar as the Silver Bell Copper Company is concerned. That the said bonds of appeal and each thereof purport to be the bonds of Albert Steinfeld, R. K. Shelton, J. N. Curtis, Silver Bell Copper Company, a corporation, and the Mammoth Copper Company, a corporation; that for the reasons aforesaid neither the said R. K. Shelton, J. N. Curtis, Silver Bell Copper Company nor the Mammoth Copper Company were proper parties to said bonds, and the Silver Bell Copper Company was wrongfully and without authority of law attempted to be made and purported to be made one of the principals and obligors on said bonds. That by reason of said facts, neither the said Charles C. Walker or the said L. H. Hofmeister, the sureties on said bonds, are liable on either of said bonds and as to them the said bonds are void and of no effect. By reason whereof there is no sufficient bond filed in this matter to give this court jurisdiction to act in the matter of said appeals or either of them.

5. That the said judgment and decree from which the said appeals were taken is entered in all respects in accordance with the mandates of the Supreme Court of the United States, and of the Supreme Court of this State, wherefore, this court has no jurisdiction to hear, entertain or determine the said appeals, other than to dismiss them.

6. That the said judgment and decree affects only the 254 Silver Bell Copper Company and its stockholders and the bondsmen of Albert Steinfeld on his first appeals of this case. That neither said R. K. Shelton, J. N. Curtis or the Mammoth Copper Company own any of the stock of the Silver Bell Copper Company, nor are they in any way affected by the judgment and decree entered in this case as more fully appears from the affidavits of Gerald Jones, R. K. Shelton and J. N. Curtis on file in this case and set out in the abstract of record in this case made and filed by attorneys for appellant and reported in said abstract on pages 258 262, inclusive, folios 774 and 786, reference to which is hereby made.

And plaintiff-appellee refers to the bonds on appeal and to the other records of this case now in this court in support of said motion.

Wherefore, plaintiff-appellee prays that the appeals of each and all of the parties appearing in this case be dismissed, and that plaintiff-appellee have judgment for his costs herein.

FRANK H. HEREFORD,
E. A. MESERVE,
Attorneys for Plaintiff-Appellee.

255 And on to-wit: the twenty-third day of October, 1913, came Hiram W. Fenner, Receiver of Silver Bell Copper Company, and filed in the Clerk's office of said Supreme Court in said entitled cause, his certain Motion to be substituted as a party therein, in lieu of said Company, in words and figures following, to-wit:

In the Supreme Court of the State of Arizona.

LOUIS ZECKENDORF, Plaintiff-Appellee,

vs.

ALBERT STEINFELD, R. K. SHELTON, J. N. CURTIS, SILVER BELL Copper Company, a Corporation; Mammoth Copper Company, a Corporation, Defendants-Appellants.

To Louis Zeckendorf, appellee, and Messrs. Frank H. Hereford and Edwin A. Meserve, his attorneys; and to Albert Steinfeld, J. N. Curtis, R. K. Shelton, and Mammoth Copper Company, a corporation, and Messrs. Eugene S. Ives, Francis J. Heney, and S. L. Kingan, their attorneys:

You will please take notice that Hiram W. Fenner, Receiver of Silver Bell Copper Company, a corporation, will on Monday, November 3rd, 1913, at ten o'clock A. M. of said day, or as soon 1056 thereafter as Counsel can be heard, move the above entitled Court, at the Court Room of said Court, in the Capitol building, in Phoenix, Maricopa County, State of Arizona, to substitute the said Hiram W. Fenner as Receiver of said Silver Bell Copper Company, in lieu and in place of said Silver Bell Copper Company, as a party appellant and defendant in the above entitled cause. A copy of said motion and exhibits thereto is hereto annexed and made a part hereof.

Dated this 20th day of October, 1913.

HIRAM W. FENNER,

Receiver of Silver Bell Copper Company.

SELIM M. FRANKLIN,

Attorney for said Hiram W. Fenner, Receiver.

Service of a copy of the above notice and of the motion therein referred to, admitted this 20th day of October, 1913.

E. A. MESERVE,

FRANK H. HEREFORD,

Attorneys for Louis Zeckendorf, Appellee.

Service of a copy of the above notice and of the motion therein referred to, admitted this 22 day of October, 1913.

E. S. IVES,

S. L. KINGAN,

Attorneys for Albert Steinfeld, R. K. Shelton, J. N. Curtis, Silver Bell Copper Company, a Corporation; Mammoth Copper Company, a Corporation, Appellants.

1057 In the Supreme Court of the State of Arizona.

LOUIS ZECKENDORF, Plaintiff, Appellee,

vs.

ALBERT STEINFELD, R. K. SHELTON, J. N. CURTIS, SILVER BELL Copper Company, a Corporation; Mammoth Copper Company, a Corporation, Defendants, Appellants.

Motion of Hiram W. Fenner, Receiver of Silver Bell Copper Company, a Corporation, to be Substituted as a Party Herein, in Lieu of said Company.

To the Honorable the Supreme Court of the State of Arizona:

Comes Hiram W. Fenner, Receiver of the Silver Bell Copper Company, a corporation, and moves the court that he, as such Receiver, be substituted as a party defendant and appellant herein, in lieu and in place of said Silver Bell Copper Company, a corporation.

And in this behalf he respectfully represents and alleges:

(1) That on the 16th day of June, 1913, the Superior Court of Pima County, State of Arizona, did, in that certain action then pending before it, wherein Louis Zeckendorf was plaintiff, and Albert Steinfeld, R. K. Shelton, J. N. Curtis, Silver Bell Copper Company, a corporation, and Mammoth Copper Company, a corporation, were defendants, render its judgment and decree (the
1058 same being filed on July 1, 1913) wherein it did, amongst other things, ratify and approve the appointment of your petitioner, Hiram W. Fenner as receiver of said Silver Bell Copper Company, a corporation, and did fix his bond as such Receiver at One Hundred Thousand Dollars to be approved by the Clerk of said Court; that thereafter and on the 30th day of June, 1913, your petitioner did file his said bond and oath as such Receiver, with said Clerk, which said bond was on said day approved by said Clerk, and that thereafter and on the 2nd day of July, 1913, the Clerk of said Superior Court of said Pima County, State of Arizona, did issue to your petitioner, under the seal of said Court, his certificate of the appointment of your petitioner as such Receiver, all of which will more fully appear from the Certificate of the Clerk of said Superior Court, hereto annexed, marked "Exhibit A," and made a part hereof.

That thereafter and on the 23rd day of September, 1913, the said Superior Court of Pima County, State of Arizona, did in said case aforesaid, make and enter an order, wherein said Court did, amongst other things, authorize your petitioner, as Receiver of said Silver Bell Copper Company, to appear and defend on behalf of said Company, the said action aforesaid, and appeal aforesaid, to-wit: the
1059 said action and appeal of Louis Zeckendorf, plaintiff and appellee, vs. Albert Steinfeld, R. K. Shelton, J. N. Curtis, Silver Bell Copper Company, a corporation, Mammoth Copper Company, a corporation, defendants and appellants, before this Honorable Court, and any other Court where said suit may be pending on appeal, or otherwise, a certified copy of which said order, duly certi-

fied by the Clerk of said Superior Court, is hereto annexed, marked "Exhibit B" and is made a part hereof.

That said cause is now pending on appeal before this Honorable Court.

Wherefore, said Hiram W. Fenner, Receiver of Silver Bell Copper Company, prays this Court, that he, as such Receiver, be substituted for said Silver Bell Copper Company as a party defendant and appellant in the said cause and in said appeal, and that Selim M. Franklin, Esq., his attorney, be entered of record as his attorney in said cause and in said appeal.

Dated this 20th day of October, 1913.

HIRAM W. FENNER,
Receiver of Silver Bell Copper Company.

SELIM M. FRANKLIN,
Attorney for said Hiram W. Fenner,
Receiver of Silver Bell Copper Company.

1060 STATE OF ARIZONA,
County of Pima, as:

Hiram W. Fenner, being first duly sworn, deposes and says: That he is the Receiver of Silver Bell Copper Company; that he has read the above and foregoing Motion, and knows the contents thereof, and that the same is true in substance and in fact.

HIRAM W. FENNER.

Subscribed and sworn to before me this 20th day of October, A. D., 1913.

My commission expires Jan'y 18", 1916.

H. E. HEIGHTON,
Notary Public.

[SEAL.]

In the Superior Court of the State of Arizona in and for Pima County.

Case No. 3496.

LOUIS ZECKENDORF, Plaintiff,
vs.
ALBERT STEINFELD et al., Defendants.

I, S. A. Elrod, Clerk of the Superior Court of the State of Arizona, in and for the County of Pima, do hereby certify that on the 16th day of June, 1913, the Court rendered its judgment and decree in the above entitled case, in which the Receiver's bond was fixed in the sum of \$100,000.00, which judgment and decree was entered of record in the minutes of said court in words and figures as follows, to-wit:

3496.

"LOUIS ZECKENDORF, Plaintiff,

vs.

ALBERT STEINFELD et al., Defendants.

Argument of the counsel for the respective parties hereto having been had at a previous session of this court before the Honorable Fred Sutter, Judge of the Superior Court of the State of Arizona, in and for Cochise County, upon the plaintiff's motion for judgment, decree and orders, and by stipulation by and between the respective parties hereto, the matter was submitted on briefs for the Court's consideration and decision: Comes now Frank E. Curley, Esq., appearing as counsel for the plaintiff herein, in the absence of F. H. Wierford, Esquire, and A. E. Meserve, Esquire, and S. L. Pattee, Esquire, and Gerald Jones, Esquire, appearing as counsel for the defendants herein for an extension in time to argue the matter of money, Esquire, and Selim M. Franklin, Esquire, appearing as attorney for the Receiver: and the Court being now fully advised in the premises does grant plaintiff's motion for judgment, and orders at judgment be entered herein in favor of the plaintiff.

It appearing to the Court that a Receiver has been heretofore appointed, but that the amount of said Receiver's bond was never fixed, it is now ordered by the Court that the amount of the Receiver's bond be fixed in the sum of \$100,000.00.

Application was made by the attorneys representing the defendants herein for an extension in time to argue the matter of attorney fees, which application was by the court denied. Argument of the respective parties hereto was then had on the matter of attorney fees to be allowed plaintiff, and the further argument on the matter was continued to Tuesday, June 17th, 1913, at ten o'clock, A. M."

That thereafter, and on the 30th day of June, 1913, the said Receiver, Hiram W. Fenner, filed his oath and bond in the sum of \$100,000.00, which bond was by the clerk approved and filed on the 1st June 30th, 1913.

That thereafter and on the 1st day of July, 1913, the judgment in said cause was signed and entered of record, in which said judgment, amongst other things, is the following order in relation to the appointment of said receiver, viz:

Now therefore, it is ordered, adjudged and decreed:

First. That the appointment of Hiram W. Fenner, heretofore made herein as receiver of all the property of every kind and character including money, books, and all other assets of or belonging to defendant, the Silver Bell Copper Company, or to the possession of which the said company is entitled, is ratified and confirmed, and any person and all persons having any books, money, property or assets belonging to the said Silver Bell Copper Company or other matter or thing, to the possession of which, said company is entitled are hereby ordered to turn over and deliver the same to the said receiver. That the said receiver hold,

retain and keep the same in possession to be distributed, disposed of, paid out or disbursed upon the orders of this court, to be made from time to time in this action: that the said receiver execute the usual oath of office and give and execute a bond in the sum of one hundred thousand (\$100,000.00) Dollars, in the usual form of a receiver's bond, to be approved by the Clerk of this Court, for the faithful performance by him, of his duties as receiver, and the said Hiram W. Fenner, as such receiver, immediately upon the filing of his oath and the approval of his bond as aforesaid, is hereby ordered and directed to take immediate possession of all the said moneys, property, books, papers and other property and assets of the said Silver Bell Copper Company, or to the possession of which it is entitled and to hold, dispose of or disburse the same in accordance with the orders and judgment herein contained, and in accordance with the orders to be made by this court from time to time hereafter."

1064 That thereafter and on the 2nd day of July, 1913, the Clerk of said Court issued his certificate to said receiver of his appointment.

Witness my hand and the seal of said court this 16th day of October, 1913.

[SEAL.]

S. A. ELROD,
Clerk as Aforesaid.

In the Superior Court of Pima County, State of Arizona.

LOUIS ZECKENDORF, Plaintiff,

vs.

ALBERT STEINFELD, R. K. SHELTON, J. N. CURTIS, SILVER BELL Copper Company, a Corporation, and Mammoth Copper Company, a Corporation, Defendants.

Hiram W. Fenner, Receiver of the Silver Bell Copper Company, herein, having filed his first report as such receiver, wherein, amongst other things, he seeks an order of this court authorizing him, as such receiver, to defend on behalf of said Silver Bell Copper Company, those two certain actions now pending before the Supreme Court of the State of Arizona, wherein said Company is one of the defendants, to-wit: the suit of Louis Zeckendorf, plaintiff, vs. Albert Steinfeld, R. K. Shelton, J. N. Curtis, Silver Bell Copper Company, a corporation, and Mammoth Copper Company, a corporation, defendants, and the suit of Mary E. Nielsen, as Administratrix of the Estate of Carl S. Nielsen, and individually, plaintiff, vs. Albert Steinfeld and the Silver Bell Copper Company, defendants; and it appearing to the court that such request should be granted:

It is ordered that said Hiram W. Fenner, as Receiver of the Silver Bell Copper Company, be, and he hereby is, authorized to appear and defend for and on behalf of said Silver Bell Copper Company, each of said actions, aforesaid, and said appeals aforesaid, before said Supreme Court of the State of Arizona, and any other court

where said suits may be pending on appeal, or otherwise, and that he employ such counsel as he may deem necessary, the compensation of such counsel to be hereafter fixed and determined by this Court.

Dated this 23rd day of September, 1913.

WILLIAM F. COOPER,
Superior Judge.

STATE OF ARIZONA,
County of Pima, ss:

I, S. A. Elrod, Clerk of the Superior Court of the State of Arizona, do hereby certify that I have compared the foregoing copy of Order for Receiver to Defend Suits in case No. 496, Louis Zeckendorf, Plaintiff, vs. Albert Steinfeld, et al., Defendants, with the original of said order remaining in this office, and the same is a true and correct transcript thereof.

Witness my hand and the seal of said court this 16th day of October, 1913.

[SEAL.]

S. A. ELROD,
Clerk of said Court.

And on to-wit: the eighteenth day of November, 1913, came Hiram W. Fenner, Receiver of Silver Bell Copper Company, and filed in the Clerk's office of said Supreme Court in said entitled cause, his certain Motion for leave of Court to dismiss the appeal of Silver Bell Copper Company, one of the appellants, in words and figures following, to-wit:

In the Supreme Court of the State of Arizona.

LOUIS ZECKENDORF, Plaintiff-Appellee,

vs.

ALBERT STEINFELD, R. K. SHELTON, J. N. CURTIS, HIRAM W. FENNER, Receiver of the Silver Bell Copper Company, a Corporation, Substituted in Place of Silver Bell Copper Company, a Corporation, and Mammoth Copper Company, a Corporation, Defendants-Appellants.

Motion of Hiram W. Fenner, Receiver of the Silver Bell Copper Company, a Corporation, Substituted in Place of Silver Bell Copper Company, a Corporation, for Leave of Court to Dismiss the Appeal of Silver Bell Copper Company, One of the Appellants, etc.

Now comes Hiram W. Fenner, Receiver of Silver Bell Copper Company, a corporation, who has by order of this court been substituted in place of said Silver Bell Copper Company, one of the appellants herein, and moves the court for leave and permission to withdraw and dismiss the appeals in the above entitled cause, of the said Silver Bell Copper Company, a corporation, one of the appellants herein, and of the undersigned, Hiram W.

Fenner, Receiver of said Silver Bell Copper Company, who has been substituted in lieu and in place of said Company, as one of the appellants herein, on the grounds and for the reasons following, to-wit:

I. That all of the judgments and orders of the lower court from which appeals have been taken in this cause, are in favor of, and to the benefit of, said Silver Bell Copper Company, and of the undersigned, Receiver of said Company, and therefore no reversal of said judgments or orders is desired by said Receiver, as one of the appellants herein; but on the contrary, this appellant as Receiver, as aforesaid, desires to have judgments and orders affirmed.

II. That the appeals taken in this cause, in the name of said Silver Bell Copper Company, a corporation, were without any right or authority whatsoever, and without the consent of the undersigned, Hiram W. Fenner, Receiver as aforesaid; that said appeals were taken by the President and Secretary of said corporation after the undersigned had been appointed and qualified as Receiver of said corporation and certificate of appointment had been issued to him, and the said officers of said corporation had no right or authority to take any action whatsoever in the matter of said appeals for or on behalf of said corporation.

1068 3. That the appeal bonds filed upon the appeals herein, each purport to be signed and executed by said Silver Bell Copper Company, by its President and Secretary, as one of the appellants, and that the President and Secretary, and the said corporation, had no right or authority to sign or execute any of said appeal bonds.

4. That in each and all of the appeal bonds, aforesaid, said Silver Bell Copper Company is one of the principal obligors and purports to sign and execute each of said bonds, as a principal and obligor; nevertheless in each of said appeal bonds it binds and obligates itself to pay to itself, as obligee, the penalty mentioned in each of said bonds; that is to say that in each of said appeal bonds herein, the said Silver Bell Copper Company as one of the appellants, agrees to pay itself, as obligee, the amount mentioned as a penalty in each of said bonds; it is both payor and payee, obligor and obligee and such bonds are utterly nugatory and of no benefit as security to said corporation, or to the undersigned, as Receiver of said corporation, for any costs or for any penalty, or for anything whatsoever.

II.

The said Hiram W. Fenner, Receiver of Silver Bell Copper Company, a corporation, one of the appellants herein, does hereby, 1069 if this Honorable Court does grant him leave to dismiss the appeals of said Silver Bell Copper Company, a corporation and his own appeals as one of the appellants substituted for said company herein, dismiss and waive each and all of the appeals herein taken by said Silver Bell Copper Company and in which he, said Receiver, now stands upon the record as one of the appellants.

III.

Said Hiram W. Fenner, Receiver as aforesaid, does further move this Honorable Court to dismiss each and all of the appeals herein, so far as the same in any way affect the said Silver Bell Copper Company, a corporation, as a party thereto or therein, or the undersigned, Hiram W. Fenner, Receiver as aforesaid, as a party thereto or therein, for the reason and upon the ground that each and all of said appeals are utterly void as to said Silver Bell Copper Company, and as to Hiram W. Fenner, Receiver of said Company, in that it appears, from each and all of the appeal bonds, filed in said appeals that said Silver Bell Copper Company is both appellant and appellee; that is to say it is on both sides of each of said appeals, and this Honorable Court has no jurisdiction of an appeal wherein a party, as appellant, appeals from a judgment or order against itself, as appellee.

Wherefore: the said Hiram W. Fenner, Receiver as aforesaid, prays:

1070 1. That his dismissal of each and all of the appeals herein of the said Silver Bell Copper Company, a corporation, as appellant, or one of the appellants, and that the dismissal of each and all of said appeals in which Hiram W. Fenner, Receiver of Silver Bell Company, a corporation, has been substituted is a party in place of said company, as appellant, or one of the appellants, be granted and allowed and that such dismissal be entered on record.

2. That each and all of the appeals herein be dismissed as to such Silver Bell Copper Company, a corporation, and as to the undersigned, Hiram W. Fenner, Receiver of Silver Bell Copper Company, in which said corporation or the undersigned as such Receiver is a party either as appellant or appellee.

Dated this 14th day of November, 1913.

HIRAM W. FENNER,
*Receiver of the Silver Bell Copper Company
and One of the Appellants Herein,*
By SELIM M. FRANKLIN,
His Attorney.

(Service of copy of above motion duly admitted by attorneys for Appellants and Appellee.)

1071 And on to-wit: the twenty-sixth day of November 1913, there was filed in the Clerk's office of said Supreme Court in said entitled cause, a certain letter to the Clerk from Honorable Eugene S. Ives, one of the attorneys for the appellants, in words and figures following, to-wit:

LOS ANGELES, November 24, 1913.

Mr. Joseph P. Dillon, Clerk Supreme Court, Phoenix, Arizona.

DEAR SIR: About a week ago I filed a brief in opposition to motion to dismiss the appeal in the case of Zeckendorf vs. Steinfeld, pending in the Supreme Court. In such brief I referred to appellant's

brief on the main appeal, which I stated would be filed within a few days. At that time the last day to file such main brief was the 22nd inst. My associate, Mr. Heney, is completing such main brief, and I have just been advised that he has obtained an extension of time to file the same. He is absent from the city and I do not know to what date he obtained such extension. Kindly advise the court to that effect, in order that the motion to dismiss may not be taken up until such main brief has been filed. I am told by Mr. Heney's office that most of it at present is in the hands of the printer.

1072 I am sending a copy of this letter to the attorney of Mr. Zeckendorf, the appellee.

Yours very truly,

EUGENE S. IVES.

And on to-wit: the twenty-seventh day of November, 1913, there was filed in the Clerk's office of said Supreme Court in said entitled cause, a certain letter to the Clerk from Honorable Frank H. Hereford, one of the attorneys for the appellee, in words and figures following, to-wit:

November 26, 1913.

Mr. Jos. P. Dillon, Clerk Supreme Court, Phoenix, Arizona:

DEAR SIR: I am in receipt of a letter from Mr. Meserve of Los Angeles, enclosing a copy of a letter to you dated November 24, 1913, signed by Eugene S. Ives, in the matter of the filing of appellant's brief in the case of Steinfeld, et al. appellants, vs. Zeckendorf and the Silver Bell Copper Company.

If any extension of time was granted Messrs. Ives and Heney, attorneys for the appellant in this case, by the court in which
1073 to file the brief referred to, we are not aware of it. Our position is, that the appeal was taken to gain time. We therefore, have made no stipulation extending the time for filing the brief, or waiving our position to urge the penalty for taking the appeal or delays in prosecuting it. We have stated to the attorneys for the other side that we will not, up to November 29, 1913, take any steps to oppose the filing of appellant's brief on the main appeal, if filed on or before that date, leaving the matter solely with the Supreme Court to decide whether or not it will consider the brief thus filed.

Under other and different conditions we would be glad to extend any courtesies in such matter to the attorneys for the other side that we could, but by reason of the position we have had to take in the matter, we felt we were precluded from making any stipulation extending their time. We also felt that if the Supreme Court had not reached and considered the matter before the attorneys for appellants had filed their brief, that they would be glad to use it upon their consideration of the case and that we would not seek to prevent it from doing so. We are anxious to have the case considered and determined at the earliest possible moment, and that the court should have the fullest of assistance from the attorneys on both sides in considering it. Under the law, a supreme court or any judge thereof

1074 may for good cause shown, enlarge the time for filing brief, and if by November 29th, 1913, the brief will be filed, we would not ask to be heard in opposition to any request on the part of appellants that their brief be filed and considered.

If Mr. Ives' letter of November 24th is placed before the court, kindly place this letter also, and oblige,

Yours very truly,

FRANK H. HEREFORD.

And on to-wit: the sixth day of January, 1914, came Hiram W. Fenner, Receiver of Silver Bell Copper Company, by his attorney, and filed in the Clerk's office of said Supreme Court in said entitled cause, his certain Notice of Defective Abstract of the Record, in words and figures following, to-wit:

In the Supreme Court of the State of Arizona.

LOUIS ZECKENDORF, Plaintiff-Appellee; HIRAM W. FENNER, Receiver for Silver Bell Copper Company, a Corporation, Appellee,

vs.

ALBERT STEINFELD, R. K. SHELTON, J. N. CURTIS, MAMMOTH COPPER COMPANY, a Corporation, Defendants-Appellants.

1075 To Albert Steinfeld, R. K. Shelton, J. N. Curtis, Mammoth Copper Company, appellants, and to S. L. Kingan, Esq., Francis J. Heney, Esq., and Eugene S. Ives, Esq., their attorneys:

You will please take notice that the Abstract of Record filed by you in the above entitled cause is insufficient and defective in this, that the same does not contain the amended pleadings upon which the issues were tried, that is to say does not contain the last amended complaint of the plaintiff and does not contain defendants' answer thereto; also does not contain the statement of the facts of the case in the nature of a special verdict made and certified to by the Supreme Court of the Territory of Arizona, on the appeal in said case from said Court to the Supreme Court of the United States; which said pleadings and statement of the facts should be added to said Abstract of the Record to make the same sufficient.

Dated Dec. 23, 1913.

SELIM M. FRANKLIN,
*Attorney for Hiram W. Fenner, Receiver
Silver Bell Copper Company, Appellee.*

(Service of above Motion duly admitted by attorneys for appellants.)

1076 And on to-wit: the twenty-seventh day of January, 1914, came Hiram W. Fenner, Receiver of Silver Bell Copper Company, by his attorney, and filed in the Clerk's office of said Supreme Court in said entitled cause, his certain Submission of Case, in words and figures following, to-wit:

In the Supreme Court of the State of Arizona.

LOUIS ZECKENDORF, Plaintiff-Appellee,

vs.

ALBERT STEINFELD, R. K. SHELTON, J. N. CURTIS, and MAMMOTH Copper Company, a Corporation, Defendants-Appellants, and Hiram W. Fenner, Receiver for Silver Bell Copper Company, a Corporation, Defendant and Appellee.

To the Honorable the Supreme Court of the State of Arizona:

Comes now Hiram W. Fenner, Receiver for Silver Bell Copper Company, one of the appellees herein, and herewith submits the above entitled cause to the court for its decision, upon the motions heretofore filed and upon the merits, hereby waiving oral argument in said case, unless such oral argument is requested by this honorable court, or is allowed by this honorable court, at the request of any of the opposing counsel.

1077 Dated January 26, 1914.

HIRAM W. FENNER,

Receiver for Silver Bell Copper Company,

By SELIM M. FRANKLIN,

His Attorney.

And on to-wit: the six-day of March, 1914, came Hiram W. Fenner, Receiver of Silver Bell Copper Company, by his attorney, and filed in the Clerk's office of said Supreme Court in said entitled cause, his certain Reply to Appellants' Motion to set aside judgment and for leave to file additional Abstract of Record, in words and figures following, to-wit:

In the Supreme Court of the State of Arizona.

LOUIS ZECKENDORF, Plaintiff-Appellee,

vs.

ALBERT STEINFELD, R. K. SHELTON, J. N. CURTIS, MAMMOTH Copper Company, a Corporation, Defendants-Appellants, and Hiram W. Fenner, Receiver of Silver Bell Copper Company, Appellee.

Reply of Fenner, Receiver, to Motion of Appellants to Set Aside Judgment and for Leave to File Additional Abstract of Record.

Comes now Hiram W. Fenner, Receiver of Silver Bell Copper Company, one of the appellees herein, and respectfully objects to the allowance of the petition and motion of Albert Steinfeld, 1078 appellant, that the judgment of dismissal herein be recalled, or vacated, or postponed, and that said appellant be allowed to file a supplemental Abstract of Record, in this case.

Such objections are based upon the following grounds and for the following reasons:

1. That the allowance of such a petition or motion, after the judgment by this honorable court, will result in the entire opening up of this cause without a motion for re-hearing being filed and allowed, for the reason that the new code of Arizona provides (Sec. 36 of the Act on Appeals, McNeil's Code, page 374), that appellant shall have thirty days after the filing of a supplemental Abstract of Record to file his briefs. Therefore, the allowance of the present petition and motion would result in appellant having the right, under the statute, to file a new brief, which would reopen this case without any motion for re-hearing being made and allowed, and probably also result in a confusion of the record which would be of no benefit whatsoever, except to cause delay in the final determination of this cause.

2. On December 23, 1913, being more than sixty days prior to the rendition of the judgment by this court, Hiram W. Fenner, by his attorney, did serve upon the attorneys for Albert Steinfeld, and the other appellants a notice that their Abstract of Record was defective,

1079 which notice has been duly filed herein; that said Steinfeld and the other appellants ignored said notice; they refused or neglected, within ten days after the filing of said notice, or at all, to file a supplemental Abstract, but submitted said cause on the Abstract which they did file; that having refused to file a supplemental Abstract, within the time provided by law, they should not be allowed to do so now, after the case has been considered and decided.

3. That there is no necessity now for the filing of any supplemental Abstract, for the reason that the court, and all the counsel in the case, were satisfied to be subjected to the inconvenience of considering the case upon the original papers of record, and which were not printed in the Abstract; and the filing of a supplemental Abstract now, simply for the purpose of placing in printed form such parts of the record as were omitted in the original Abstract will serve no useful purpose whatsoever, and will not remedy the inconvenience heretofore suffered by the court and counsel; but may cause a complication in the record which ought to be avoided, in order to prevent unnecessary delay.

SELIM M. FRANKLIN,
*Attorney for Hiram W. Fenner, Receiver
of Silver Bell Copper Company.*

(Service of above Reply duly admitted by attorneys for Appellants and Appellee.)

1080 And on to-wit: the twenty-third day of July, 1914, came the appellee by his attorneys, and filed in the Clerk's office of said Supreme Court of the State of Arizona in said entitled cause, No. 1347, his certain præcipe in words and figures following, to-wit:

In the Supreme Court of the State of Arizona.

No. 1347.

ALBERT STEINFELD, Plaintiff in Error,
vs.
LOUIS ZECKENDORF, Defendant in Error.

To the Clerk of the above entitled court:

Please incorporate in the record on the appeal of Albert Steinfeld et al., in the Supreme Court of the United States in addition to the papers designated by the attorney for the appellants or plaintiffs in error, the following:

- Motion for Judgment and Decree, filed Feb'y 6, 1913;
- Motion to Dismiss Appeals;
- Motion to Substitute Receiver of Silver Bell Copper Co.;
- Motion of Receiver for Leave to Dismiss Appeal of Silver Bell Copper Co.;
- Notice of Defective Abstract of Record;
- Letter from E. S. Ives and F. H. Hereford;
- 1081 Submission of case by Hiram W. Fenner, Receiver;
- Reply of Receiver to the Motion to Set Aside Judgment;
- Orders made on the motions to dismiss appeal.

Also, if not already inciuded, the entire judgment roll, with the mandate from the Supreme Court of United States to the Supreme Court of the State of Arizona and the mandate of the Supreme Court of the State of Arizona to the District Court of the State of Arizona, in and for the County of Kingman.

FRANK H. HEREFORD,
EDWIN A. MESERVE,
Attorneys for Respondents or Defendants in Error.

The time for serving and filing the foregoing præcipe is hereby enlarged so that the same may be presented and filed with the Clerk this day.

Dated, Phœnix, Arizona, July —, 1914.

*Chief Justice of the Supreme Court
of the State of Arizona.*

Received copy of the within this 22d day of July, 1914.

EUGENE S. IVES,
Attorney for Plaintiff.

1082

Clerk's Certificate.

UNITED STATES OF AMERICA,
Supreme Court, State of Arizona, ss:

I, C. F. Leonard, Clerk of the Supreme Court of the State of Arizona, do hereby certify the foregoing pages numbered from 2 to 1024, inclusive, to be a full, true and complete copy of all that portion of the record indicated by Appellants' Præcipe as necessary to be incorporated into the transcript of the record on appeal in a certain cause lately pending in this court, No. 1347, wherein Albert Steinfeld, R. K. Shelton, J. N. Curtis, Silver Bell Copper Company, a corporation, and Mammoth Copper Company, a corporation, were appellants, and Louis Zeckendorf was appellee; and

I further certify that pages numbered from 1025 to 1081, inclusive, contain a full, true and complete copy of all the additional portion of the record desired by appellee as necessary to be incorporated into the transcript of record on appeal in said case, as indicated by a Præcipe filed by said appellee, together with a full, true and complete copy of appellee's Præcipe and Objections to Præcipe filed herein by appellants.

And I further certify that the attached Citation and Order of Enlargement are the originals issued by said Supreme Court in said above entitled cause.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said Court, this 18th day of August, A. D., 1914, at Phoenix, Arizona.

[Seal Supreme Court, State of Arizona.]

C. F. LEONARD,
Clerk Supreme Court of Arizona,
By ANGIE P. BYRNE,
Deputy Clerk.

1083 In the Supreme Court of the United States.

LOUIS ZECKENDORF, Plaintiff-Appellee,

and

HIRAM W. FENNER, Receiver, Appellee,

VS.

ALBERT STEINFELD, R. K. SHELTON, J. N. CURTIS, SILVER BELL Copper Company, a Corporation; Mammoth Copper Company, a Corporation, Defendants-Appellants.

UNITED STATES OF AMERICA, ss:

The President of the United States of America to Louis Zeckendorf, Plaintiff, and Hiram W. Fenner, Receiver, Appellees, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States to be held at Washington in the District of Columbia, on the 29th day of June, 1914, pursuant to an appeal allowed and filed in the office of the Supreme Court of the State of Arizona, wherein Albert Steinfeld, R. K. Shelton, J. N. Curtis, Silver Bell Copper Company, a corporation, Mammoth Copper Company, a corporation, are appellants, and you, Louis Zeckendorf and Hiram W. Fenner, Receiver as aforesaid are appellees, to show cause, if any there be, why the judgment rendered against said appellants as in the said appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness The Honorable Edward D. White, Chief Justice of the Supreme Court of the United States, this 30th day of April, 1914.

ALFRED FRANKLIN,

Chief Justice Supreme Court, State of Arizona.

1084 Service of the above citation admitted this 30th day of April, 1912.

FRANK H. HEREFORD,

Attorney for Appellee Zeckendorf.

SELIM M. FRANKLIN,

Attorney for Receiver, Appellee.

1085 [Endorsed:] Supreme Court United States. Louis Zeckendorf, Plaintiff-Appellee, and Hiram W. Fenner, Receiver-Appellee, vs. Albert Steinfeld, and others, Defendants-Appellant. Citation. No. 1347. In the Supreme Court, State of Arizona. Filed Apr. 30, 1914. C. F. Leonard, Clerk Supreme Court.

1086 In the Supreme Court of the United States.

ALBERT STEINFELD et al., Appellants,

v.

LOUIS ZECKENDORF and HIRAM W. FENNER, Receiver, Appellees.

OFFICE OF THE CLERK OF THE SUPREME COURT OF ARIZONA, ss:

In the above entitled appeal to the Supreme Court of the United States from the judgment of the Supreme Court of the State of Arizona the record for use on such appeal is voluminous and it will be impossible for the undersigned to prepare and transmit as required by law the record aforesaid to the Clerk of the Supreme Court of the United States by the day of the return in the citation upon such appeal; and in order that the transcript of such record may be prepared and transmitted as required by law it will necessary to enlarge the time for a period of at least sixty days from the return day of said citation.

C. F. LEONARD,

Clerk of the Supreme Court of the State of Arizona.

Dated at Phoenix, Arizona, this 11th day of June, 1914.

1087 [Endorsed:] Supreme Court of United States, Albert Steinfeld et al., Appellants, v. Louis Zeckendorf and Hiram W. Fenner, Receiver, Appellees. Certificate of Clerk that time for filing record in U. S. Supreme Court must be enlarged. No. 1347. In the Supreme Court, State of Arizona. Filed Jun- 15, 1914. C. F. Leonard, Clerk Supreme Court.

1088 In the Supreme Court of the United States.

ALBERT STEINFELD et al., Appellants,

v.

LOUIS ZECKENDORF and HIRAM W. FENNER, Receiver, Appellees.

Order Enlarging Time for Docketing and Filing Record in Supreme Court of the United States.

The above named appellants having taken an appeal to the Supreme Court of the United States from the judgment of the Supreme Court of the States of Arizona and good cause having been shown why the time within which the case may be docketed and the record filed with the clerk of the Supreme Court of the United States should be enlarged, it is hereby

Ordered that the time within which the case may be docketed and the record filed with the clerk of the Supreme Court of the United States be and the same is hereby enlarged until and including August 28th, 1914, and the return day of the citation here-

tofore filed and served upon such appeal is hereby enlarged and extended until said last named day.

Dated at Phoenix, Arizona, June 15, 1914.

ALFRED FRANKLIN,
*Chief Justice of the Supreme Court
of the State of Arizona.*

1089 [Endorsed:] Supreme Court of United States. Albert Steinfeld et al., Appellants, v. Louis Zeckendorf and Hiram W. Fenner, Receiver, Appellees. Order Enlarging Time to File Record in United States Supreme Court. No. 1347. In the Supreme Court, State of Arizona. Filed Jun-15, 1914. C. F. Leonard, Clerk Supreme Court.

Endorsed on cover: File No. 24,358. Arizona Supreme Court. Term No. 239. Albert Steinfeld, R. K. Shelton, J. N. Curtis, Silver Bell Copper Company, and Mammoth Copper Company, appellants, vs. Louis Zeckendorf and Hiram W. Fenner, receiver. Filed August 31, 1914. File No. 24,358.

8

Office Supreme Court, U. S.
FILED
MAR 22 1915
JAMES D. MAHER
CLERK

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1914.

No. 614. 239

ALBERT STEINFELD ET AL., APPELLANTS,

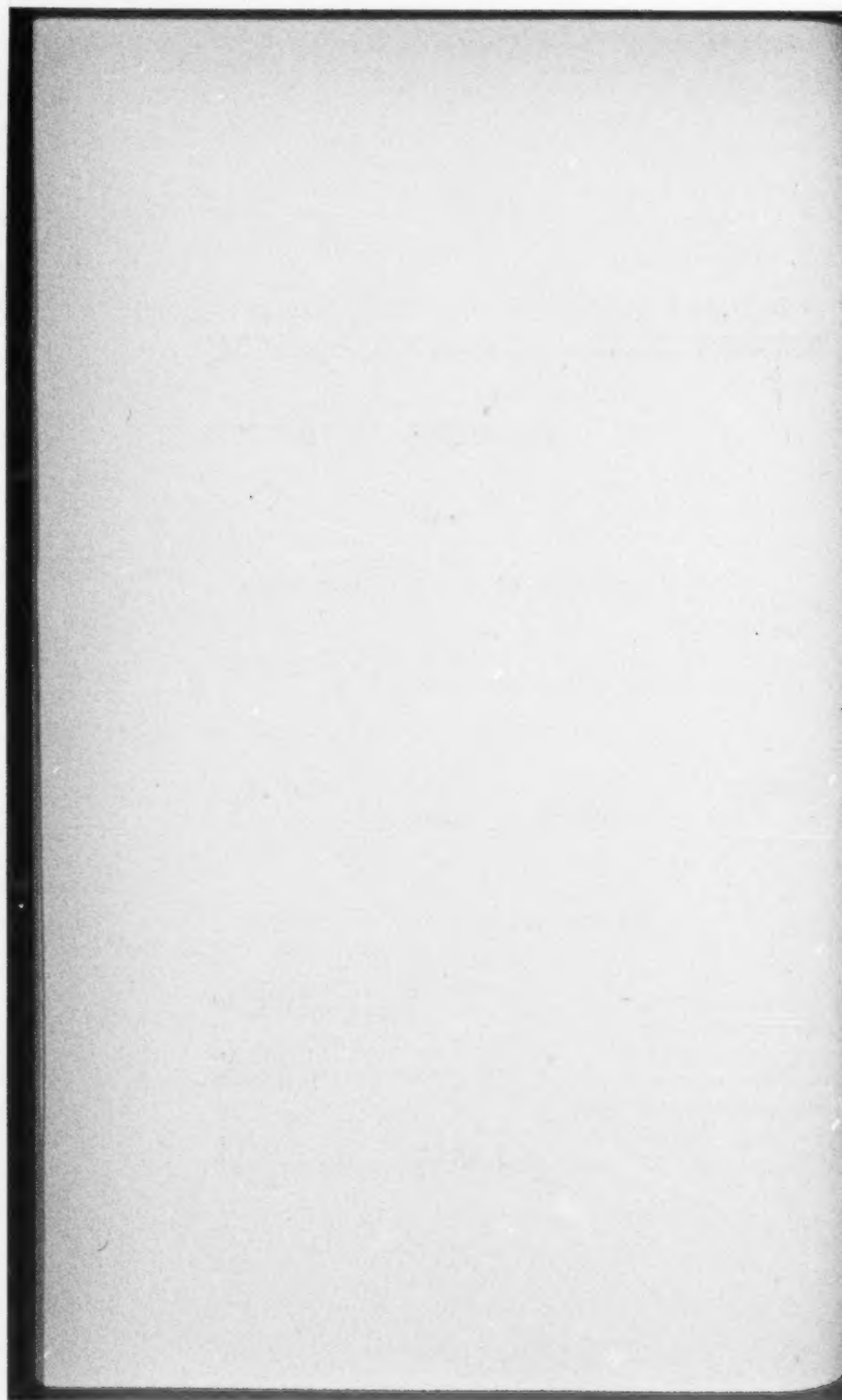
vs.

LOUIS ZECKENDORF ET AL.

MOTION TO ADVANCE.

EDWIN A. MESERVE,
FRANK H. HEREFORD,
Attorneys for Appellee Zeckendorf.
SELIM M. FRANKLIN,
Attorney for Fenner, Receiver.

(24,358)



IN THE
SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1914.

No. 614.

ALBERT STEINFELD, R. K. SHELTON, J. N. CURTIS,
SILVER BELL COPPER COMPANY, A CORPORATION,
AND MAMMOTH COPPER COMPANY, A CORPORATION,
APPELLANTS,

vs.

LOUIS ZECKENDORF AND HIRAM W. FENNER,
RECEIVER, APPELLEES.

MOTION TO ADVANCE.

Now comes Louis Zeckendorf, one of the appellees in the above-entitled case, and alleges:

That this case was on June 7, 1912, adjudicated and decided by this court upon its merits. It then was entitled "Supreme Court of the United States, October term, 1911, No. 139, Louis Zeckendorf, appellant, *vs.* Albert Steinfeld, J. N. Curtis, R. K. Shelton, *et al.*;" No. 140, Albert Steinfeld,

J. N. Curtis, R. K. Shelton, *et al.*, appellants, *vs.* Louis Zeckendorf and Silver Bell Copper Company."

This is the second appeal of the said entitled case.

To enable this appellant to properly present a motion to affirm and dismiss this case with penalties it is necessary that the transcript be printed.

Wherefore, under clause 4 of Rule 26 of this court, this appellee prays for an order advancing this case on the calendar or docket of this court.

Dated Tucson, Arizona, March 17, A. D. 1915.

Respectfully submitted,

EDWIN A. MESERVE,
FRANK H. HEREFORD,

Attorneys for Appellee Louis Zeckendorf.

I, Hiram W. Fenner, receiver, one of the appellees in the above-entitled case, hereby join in the motion to advance this case on the calendar or docket of this court.

HIRAM W. FENNER,

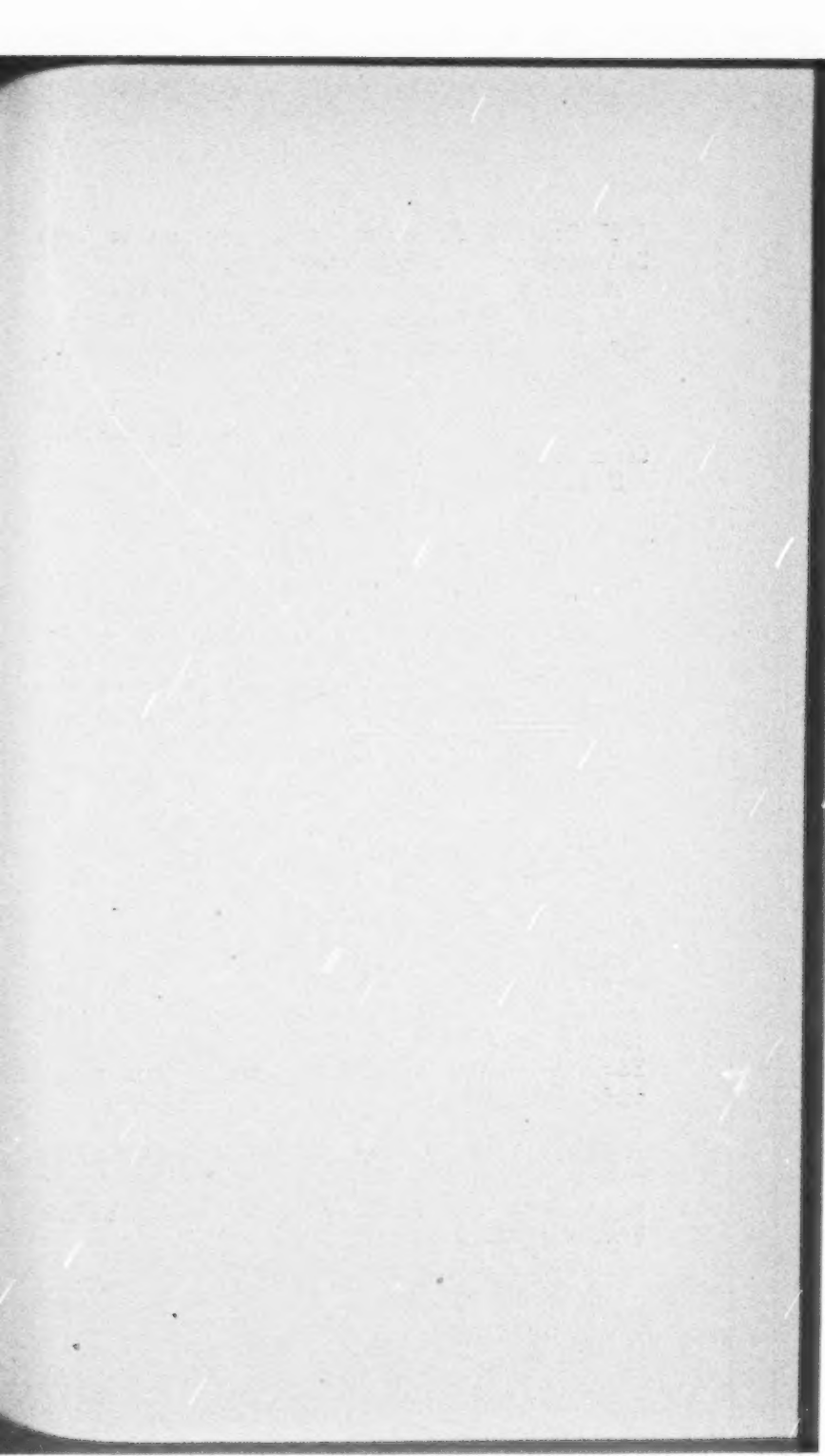
Receiver,

By SELIM M. FRANKLIN,

His Attorney.

[Endorsed:] 614/24,358. No. —. In the United States Supreme Court. Albert Steinfeld, R. K. Shelton, J. N. Curtis, Silver Bell Copper Company, a corporation, and Mammoth Copper Company, a corporation, appellants, *vs.* Louis Zeckendorf and Hiram W. Fenner, receiver, appellees. Service of copy admitted this 17th day of March, 1915. E. S. Ives, att'y for appellants. Frank H. Hereford, Edwin A. Meserve, attorneys for appellee Louis Zeckendorf.

[Endorsed:] File No. 24,358. Supreme Court U. S. October term, 1914. Term No. 614. Albert Steinfeld *et al.*, appellants, *vs.* Louis Zeckendorf *et al.* Motion to advance. Filed March 22, 1915.



IN THE
SUPREME COURT
OF THE
UNITED STATES

LOUIS ZECKENDORF,
Plaintiff-Appellee,

vs.

ALBERT STEINFELD, R. K.
SHELTON, J. N. CURTIS, SIL-
VER BELL COPPER COM-
PANY, a corporation, MAM-
MOTH COPPER COMPANY, a
corporation,
Defendants-Appellants.

ANSWER TO MOTION TO ADVANCE CAUSE
ON CALENDAR

Now comes Albert Steinfeld, one of the appellants in the above entitled suit, and replying to the prayer of the appellee, Louis Zeckendorf, for an order advancing the said suit on the calendar or docket of this Court, respectfully represents:

That this is the second appeal of the said suit; that upon the prior appeal the rights of the respective parties were not by this Court adjudicated and decided upon the merits thereof. On the con-

trary, it was one of those classes of cases in which the jurisdiction of this Court on appeal is limited to questions of law only.

That this appellant has no objection to the case being advanced upon the calendar, and if this Court so wishes, will forthwith direct the Clerk of the Court to print the record.

That it appears by the record on file in this Court, but not yet printed, that the said Louis Zeckendorf, appellee, did, upon the return of the mandate of this Court upon the prior appeal, move in the Superior Court of the State of Arizona for judgment, and that in opposition to said motion for judgment, this appellant did file certain objections and exceptions which show conclusively that certain inferences of fact drawn by this Court, solely, as we contend, for the purpose of illustrating the reasons for its opinion, were directly confuted by the undisputed evidence in the case, which evidence, as this Court has often held, was not subject to consideration by this Court upon the prior appeal, and that the intention of the parties who voted to rescind the contract of May, 1903, was not to modify the same, as this Court inferred from that part of the evidence which was before it in the form of an alleged finding of fact, but was to rescind the same *in toto*, and that such fact of intent, which was held upon the first appeal to the territorial Supreme Court to be immaterial, and which this Court held to be absolutely material, and the pivotal fact upon which the rights of the parties depend, has not been adjudicated by any tribunal with jurisdiction to consider the evidence.

For the guidance of the Court, we transmit herewith nine copies of the abstract of record before the Supreme Court of the State of Arizona, which is the record on file in this Court, and most earnestly invite the attention of the Court to the exceptions and objections to judgment which were filed in that Court by this appellant, and which appear on pages 36 to 233 of said abstract.

We also invite the attention of this Court to the fact that the judgment from whose affirmance by the State Supreme Court this appeal is taken, comprised certain questions which were not even considered by this Court upon the prior appeal, to-wit:

- a. Interest;
- b. Attorney's fees;
- c. An accounting of \$25,750 of money concededly belonging to the Silver Bell Copper Company but which had been garnisheed in the hands of this appellant in a certain action brought against the Silver Bell Copper Company by Selim M. Franklin for \$51,000, and which this appellant held without claim of ownership, but entirely in pursuance of such garnishment.

On none of these three questions was any evidence taken or consideration had before the Court. The Court simply upon motion on behalf of Zeckendorf, rendered judgment against this appellant upon all of such matters, all of which we respectfully represent shows error in the granting of a judgment upon motion even though, which we strenuously dispute, the opinion of this Court and its mandate directing that the judgment be reversed for further proceedings not inconsistent with the opin-

ion, should have constituted authority on the part of the Superior Court to award judgment on the merits against this appellant and to divest itself of any discretion to consider whether under the evidence this appellant might be entitled to judgment in his favor which judgment would be entirely consistent with the law as laid down in the opinion of this Court.

We also transmit to this Court copies of a brief used by this appellant before the Supreme Court of the State of Arizona upon a motion for a rehearing, and invite the particular attention of the Court:

- a. As to interest, to pages 1 to 3 thereof.
- b. As to amount garnisheed, to pages 3-6.
- c. As to attorney's fees, to pages 3-6.
- d. As to the merits, to pages 7-93, and in particular, to pages 27 to 47.

WHEREFORE, we pray that whatever action this Court may take in advancing the case, the privilege of full presentation by oral argument and printed brief be reserved to this appellant.

EUGENE S. IVES,
FRANCIS J. HENEY,

Attorneys for Appellant, Albert Steinfeld.



IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1915

No. 239.

**ALBERT STRINFIELD ET AL. (DEMANDANTS),
APPELLANTS.**

**LOUIS ZECKENDORF (PLAINTIFF) AND HIRAM W.
FENNER, RECEIVER (DEFENDANT), APPELLEE.**

**BRIEF OF LOUIS ZECKENDORF, PLAINTIFF
APPELLEE.**

**FRANK H. HEREFORD and
EDWIN A. MESERVE,**

*Attorneys for L. Zeckendorf,
Plaintiff and Appellee.*

INDEX.

	Page
Statement of the case on this appeal.....	1-7
Appellants' contentions	7, 8
Appellee Zeckendorf's contentions.....	8-11
Statement preliminary to argument.....	11-13
Appellants' statements of fact incorrect and misleading.....	12, 13
Opening statement on the merits of the appeal, showing appeal to be frivolous and taken for delay only.....	13
Refusal of trial court to grant a new trial.....	16-22
Argument on merits of claim that appellants are entitled to a new trial	22-30
Attorneys' fees, legal right to.....	30
Appellants have no right to appeal from judgment as to attorneys' fees	31
Attorneys' fees allowed were proper.....	32
Francis and Volkert payment.....	34
\$25,750.00 and interest involved in Franklin garnishment.....	37
Interest	39-41
Interest on Franklin garnishment money.....	39
Interest on interest of second cause of action.....	40, 41
Matters in printed record not properly before this court.....	41 <i>et seq.</i>
No right of appeal or writ of error from State courts not involving Federal question.....	43
Enabling act admitting Arizona does not give this court jurisdiction either by appeal or writ of error.....	45

LIST OF CASES CITED.

First National Bank, etc., <i>vs.</i> County of Yankton, 101 U. S., 129.	18
Garfield <i>vs.</i> U. S., 92 U. S., 520.....	18
Irinson <i>vs.</i> Hutton, 98 U. S., 79.....	18
Lake Superior & M. R. Co. <i>vs.</i> U. S., 93 U. S., 442.....	19
Northern Pacific R. R. Co. <i>vs.</i> Holmes, 155 U. S., 137.....	45
Quinn <i>vs.</i> U. S., 90 U. S., 30.....	18
Stofella <i>vs.</i> Nugent, 217 U. S., 499.....	18, 19
Stringfellow <i>vs.</i> Cain, 98 U. S., 610.....	18
Thompson <i>vs.</i> Maxwell Land Grant Co., 168 U. S., 451.....	17
Tilton <i>vs.</i> Coffield, 93 U. S., 163.....	18
Union Pac. R. R. Co. <i>vs.</i> U. S., 90 U. S., 402.....	18
U. S. <i>vs.</i> Sanford Perryman, 100 U. S., 235.....	18
U. S. <i>vs.</i> Murray, 100 U. S., 536.....	18
U. S. <i>vs.</i> Shrewsbury, 90 U. S., 508.....	18
U. S. <i>vs.</i> Landers, 92 U. S., 77.....	18
U. S. <i>vs.</i> Dickelman, 92 U. S., 520.....	18
U. S. <i>vs.</i> Camon, 184 U. S., 572; 46 Law Ed., 694.....	17
U. S. <i>vs.</i> New York Indians, 173 U. S., 464.....	17
Van Dyke <i>vs.</i> Cordova Copper Co., 234 U. S., 188.....	43
Zeckendorf <i>vs.</i> Steinfeld, 225 U. S., 445.....	20-27



IN THE
SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1915.

No. 239.

ALBERT STEINFELD ET AL. (DEFENDANTS),
APPELLANTS,

vs.

LOUIS ZECKENDORF (PLAINTIFF) AND HIRAM W.
FENNER, RECEIVER (DEFENDANT), APPELLEES.

**BRIEF OF LOUIS ZECKENDORF. PLAINTIFF.
APPELLEE.**

Statement of the Case.

In the month of February, 1914, Louis Zeckendorf, the plaintiff, as a stockholder of the Silver Bell Copper Company, and for its benefit, began this action in the District Court of the First Judicial District, Territory of Arizona, in and for Pima County, against Albert Steinfeld, R. K. Shelton, J. N. Curtis, Mammoth Copper Company (a corporation), and Silver Bell Copper Company (a corporation), the latter being made a defendant under the rule in equity requiring that to be done. The purpose of the action was to

recover from Albert Steinfeld and the Mammoth Copper Company certain money which Zeckendorf alleged and claimed Steinfeld, in his name and in the name of the Mammoth Copper Company, had illegally taken from the Silver Bell Copper Company on the 20th day of January, 1903 (Third Amended Complaint, Transcript, pages 240 *et seq.*, the prayer of the complaint appearing on pages 267-268, folios 630 to 632, inc.). It was alleged that Steinfeld, one of the directors of the Silver Bell Copper Co., absolutely controlled Shelton and Curtis, the other two directors, and that they at all times as directors and officers of the corporation were under his complete dominion and control and did whatever he directed and not otherwise. This allegation, by all the courts, was found to be true.

The complaint is on two causes of action. The first cause of action was to recover from Steinfeld, in round numbers, \$300,000, a part of the proceeds of the sale by the Silver Bell Copper Company of some mines, which proceeds it was alleged and claimed Steinfeld had misappropriated. The second cause of action was to recover from Steinfeld the sum of \$33,111 dividends on stock of the Silver Bell Copper Company, which it was claimed Steinfeld had caused to be illegally paid to him.

As against the Silver Bell Copper Company the action was for a receiver of that corporation, that it be ultimately dissolved, and that Zeckendorf in that action have judgment against the corporation for his attorney's fees and expenses. The action was first tried in the territorial district court in and for Pima County on May 16, 1905 (Tr., folio 478). On October 21, 1905, findings and judgment dated September 16, 1905, were filed (Tr., pages 217 and 219). This judgment was in favor of plaintiff on all causes of action, adjudged the appointment of a receiver of the corporation and its ultimate dissolution, Mr. Fenner, the present receiver being appointed by that judgment.

The defendants appealed from that judgment to the Supreme Court of the Territory. That court, on the 23d day

of March, 1907, reversed the judgment and sent the case back to the district court for a new trial (Tr., pages 227 to 240, the final order being found on folio 552, page 240). After the case came back to the district court, plaintiff amended his complaint, filing the pleading, denominated and known as Third Amended Complaint, on January 4, 1908 (Tr., pages 240 to 269). Defendants answered this pleading on January 6, 1908 (Answer, Tr., pages 270 to 298). On that same day the case came on for trial a second time, and was submitted on the evidence received at the first trial and certain stipulations (Tr., pages 299 and 300). On October 2, 1908, the judge of the district court filed his findings of fact and conclusions of law, and gave and entered his judgment on this second trial, the findings and judgment each being dated July 30, 1908 (Tr., pages 299 to 344 as to the findings, and pages 344 to 346, inc., as to the judgment). In Finding XXXII (Tr., pages 325 to 334, inc.) the judge of the district or trial court incorporated *as and being a finding of fact* the minutes of the much-discussed meeting of December 26, 1903, these minutes being in the form of a phonographic report of everything that was said and done at that meeting. We may be pardoned for here digressing and adding that that finding in that exact form, without objection as to its not being a "finding," but a mere statement of "evidence at large" (to use appellants' language), was carried along through the case up to the decision by this honorable court, when by petition for rehearing before this court the now appellants' first made an attack on it as not being a finding, and which attack is now practically the substance of the present appeal.

The district court gave judgment against Zeckendorf in favor of Steinfeld on the first cause of action, except that it adjudged that he held \$25,750 in his hands as the property of the Silver Bell Copper Co., under a garnishment served on him in the action of Franklin *vs.* Silver Bell Copper Co., and gave judgment on the second cause of action in favor of Zeckendorf and against Steinfeld for the net sum (after

allowing him certain credits) of \$20,850, "*and interest thereon at the rate of six per cent per annum from the 20th day of January, 1904*" (Tr., folio 839). The court also readjudged the appointment of a receiver of the Silver Bell Copper Co. and its ultimate dissolution, and gave judgment in favor of Zeckendorf, and *against the corporation* (not the appellants here) for certain attorney's fees and costs, the attorney's fees then allowed being for what was done "up to and including the entry of this judgment" (Tr., folio 840, page 345).

Zeckendorf appealed to the Supreme Court of the Territory of Arizona from that part of the judgment which was against him, and all the defendants appealed from all the balance of the judgment. This appeal was decided on March 20, 1909, the Supreme Court of the Territory, for the reasons stated in its opinion, affirming the judgment of the district court in all respects (Tr., pages 355 to 367, inc., for the opinion and order). The Supreme Court of Arizona in thus deciding the case did so on the findings made by Judge Campbell of the district court, accepting and acting on the matter set out in Finding XXXII, as and being a proper finding and not a mere statement of "evidence at large." From that part of this judgment by the Supreme Court of the Territory of Arizona which was against him, Zeckendorf appealed to this honorable court, and the defendants appealed from the remainder. These two appeals are contained in and fully set forth in the records of this honorable court, in cases Nos. 139 and 140 of the October, 1911, term of this court (225 U. S.). The Supreme Court of the Territory certified to this honorable court "the facts of the case in the form of a special verdict," as required by the Statutes of the United States (Tr., pages 368 to 413, inc.).

These appeals came on regularly for argument before this honorable court on March 15, 1912, and were decided by this honorable court (Mr. Justice Day stating the facts and writing the opinion) on June 7, 1912, the statement and

opinion being reported in 225 U. S., pages 445 *et seq.*, to which we respectfully refer. The defendants-appellees thereupon filed a petition in this court for a rehearing, therein claiming that the matters set out in Finding XXXII, above referred to and on which this court had largely based its decision, was improperly treated as a finding, and that they had not had their day in court on the question of intent, etc. (See Petition for Rehearing filed in cases Nos. 139 and 140 (225 U. S.), October term, 1911.)

This petition for rehearing was by this court in due course denied. While this case was pending in this court Arizona was admitted to the Union as a State, the courts of that State, so far as this case is concerned, created by its constitution being the Supreme Court of the State, and superior courts for its several counties; the Superior Court of Pima County, succeeding the District Court of the First Judicial District in and for Pima County.

The mandate of this court to the Supreme Court of the State of Arizona went down under date of November 12, 1912 (Tr., pages 413 to 415).

The defendants-appellees (appellants here) then moved the Supreme Court of the State that it correct its record to the Supreme Court of the United States; also that that court "consider and determine its findings of fact herein in the nature of a special verdict, and further proceed to consider and determine this cause as of the time of its rendition of its judgment herein and render a new judgment in said cause." Both motions were denied. Reason stated, want of jurisdiction (Tr., folios 1016-1017, page 415). The mandate from the Supreme Court of the State of Arizona embodying the mandate from this honorable court went down to the Superior Court of Pima County on February 3, 1913 (Tr., pages 2 to 6, inc.).

On February 5, 1913, plaintiff moved the Superior Court of Pima County for a judgment in accordance with the mandate of this honorable court as forwarded and endorsed by

the mandate of the Supreme Court of Arizona (Tr., folios 12 and 13).

On March 1, 1913, an amended motion for judgment was filed (Tr., pages 9 to 16).

On May 13, 1913, Albert Steinfeld, for himself and not for any other defendant, filed his exceptions to the motion and objections to the proposed judgment (Tr., pages 16 to 96, inc.). The major portion of this so-called objection and exception will be found to contain disconnected extracts of portions of the evidence *on which Judge Campbell's, and the Supreme Court of Arizona's findings were based*, the same being presented on the apparent theory that the Superior Court of Pima County, after all that had transpired in this case, could then grant a new trial, because the findings of Judge Campbell and of the Supreme Court of the Territory of Arizona *were not supported by the evidence*.

On July 1, 1913, his honor, Judge Fred Sutter, judge of the Superior Court of Pima County, filed his judgment pursuant to plaintiff's motion (Tr., pages 96 to 101, inc.). This is the judgment, *if any*, now to be considered and reviewed by this honorable court.

On June 25, 1913, Steinfeld and other defendants moved to set aside that judgment (Tr., pages 101 to 103).

On the same day they filed a motion for a new trial, a motion to "modify the judgment," a motion to "modify the judgment and discharge the receiver," and on July 1, 1913, filed "additional exceptions and objections to the judgment" (Tr., pages 109 to 114).

On August 12, 1913, Steinfeld and other defendants filed in open court a notice of appeal from the judgment, and also from the orders denying the aforesaid motions (Tr., pages 165 to 167). And afterwards on the same day gave another notice of appeal (Tr., pages 167 and 168).

On November 4, 1913, Hiram W. Fenner, the receiver of the Silver Bell Copper Company, was substituted as a defendant in the place and stead of the Silver Bell Copper Co.

There is no appeal from this order. Since that time Mr. Fenner has been co-operating with the plaintiff and doing all in his power and in that of his able counsel, to bring this frightfully extended and expensive litigation to a close, and to put into *operative effect* the *decision* of this honorable court. The receiver was made an appellee herein, and as such has filed his brief in support of the judgment.

The plaintiff and the receiver, as appellees before the Supreme Court of the State of Arizona, moved to dismiss the appeals to that court. These motions were granted (Tr., pages 185 to 190, inc.). Then followed motions and petitions for rehearing, etc. (Tr., pages 190 to 192).

The appeals as to Curtis, Shelton, Mammoth Coffee Company, and Silver Bell Copper Company were particularly dismissed because there was in fact no judgment against them.

On April 30, 1914, the defendants sued out their appeal to this honorable court (Tr., pages 192 and 193).

This appeal was filed in this honorable court on August 31, 1914.

The brief for appellants was served and filed October 12, 1915, the day on which this appeal was called for hearing.

Contentions of Appellants.

From their assignment of errors contained in Appellants' Brief, and not from the assignment of errors, contained in the transcript of the record on this appeal (Tr., page 195), we understand appellants' contentions to be:

First. The Supreme Court of the State of Arizona should have entertained and not dismissed their appeal.

Second. The defendants should have been granted a new trial, or at least the judge of the Superior Court of Arizona should have exercised his judicial discretion in passing upon their application for a new trial, and that he did not.

Third. That the judgment as entered was erroneous and not in accordance with the decision and mandate of this honorable court, because it was excessive in the amounts; (a) \$19,901.75, principal and interest, paid to Francis & Volkert; (b) amount of Franklin garnishment, principal, and interest, \$40,363.11; (c) amount of attorney's fees \$6,026.48 and \$33,098.65, and (d) compound interest on second cause of action.

Fourth. Without repeating them, that error was committed by the trial court as set forth in "V," page VIII of Appellants' Brief. (See Brief, pages VII and VIII.)

Contentions of Zeckendorf, Appellee.

The plaintiff-appellee, with whom the receiver fully concurs (see Brief for receiver), contends as follows:

First. THAT ALL PROCEEDINGS OF OBSTRUCTION, OBJECTION AND APPEAL TAKEN BY STEINFELD, SHELTON, CURTIS, AND THE MAMMOTH COPPER CO., SINCE THE DECISION OF THIS COURT BECAME FINAL, HAVE HAD FOR THEIR PRIMARY PURPOSE THE ENABLING OF ALBERT STEINFELD TO RETAIN AND USE OVER FOUR HUNDRED THOUSAND DOLLARS OF THE MONEY OF THE SILVER BELL COPPER COMPANY, WHICH THIS HONORABLE COURT DECIDED BELONGED TO AND WAS ITS PROPERTY, AND UNLAWFULLY APPROPRIATED AND TAKEN FROM IT BY STEINFELD.

Second. That the *ultimate question for decision* by this honorable court on the former appeal was, to whom did that money belong? That this court *decided* that it belonged to the Silver Bell Copper Company; that every question of fact and law necessary to the rendition of that decision was involved in the decision, and thereby for all time became *res adjudicata* and the *law* of the case, and that no court thereafter had any power to alter or disturb the same.

Third. That the findings of fact made and as certified to this court by the Supreme Court of the Territory of Arizona, as the same were *construed, interpreted, and acted upon* by this honorable court, thereby became final and for all time *res adjudicata* as to the facts of the case, and that no court had or has the power thereafter to disturb, alter, modify or change the same, or to retry any of the issues of fact of the case.

Fourth. That the decision and mandate of this court, not only did not contemplate, but did not permit of any retrial of any issue of fact or law in the case: Furthermore that there is no legal or authenticated record of Judge Sutter's reasons for entering the judgment, and denying the application for a new trial, and therefore, if he were vested with discretion, as appellants' claim, it will be presumed here that he properly exercised that discretion.

Fifth. That the judgment as given and entered by Judge Sutter was in strict conformity with the opinion and decision of this honorable court, and in no sense inconsistent therewith.

Sixth. That the allowance to Steinfield of the credit on account of the Francis & Volkert payment by him is mathematically correct; but whether so or not, that that credit was one which Steinfield did not claim in his pleadings, that the amount thereof was not an issue in the case, and that the credit, in whatever amount allowed, was purely voluntarily on the part of the superior court, and that, not having been and not being an issue made by the pleadings in the case, it is entirely new matter, over which this court has and can have no jurisdiction on an appeal from a decision by a State court. It was not a matter involved in any "future proceeding" contemplated by the decision and mandate of this honorable court.

Seventh. That, as to the amount of money retained by Steinfeld under the Franklin garnishment, the judgment is mathematically correct in its net amount.

Eighth. That as to the attorney's fees: (a) That is a judgment against the Silver Bell Copper Company; that a receiver by the first judgment was appointed of that company; that that part of the first judgment was affirmed by the Supreme Court of the Territory and by this honorable court; that that receiver, and no one else, could appeal from that judgment; that he has not done so, and there is, therefore, no appeal now before this honorable court from that part of the judgment which is against the Silver Bell Copper Company; (b) that this judgment is in strict accord with the findings as to the proper amount; (c) that the amount of attorney's fees to be allowed is a matter of discretion in the lower trial court, which the appellate court will not disturb; and (d) that the allowance made is not *inconsistent* with the decision of this honorable court.

Ninth. That, as to the claim of compound interest on the judgment on the second cause of action, the complete answer is that that judgment was not only for \$20,850, but also for interest on that amount at the rate of 6 per cent per annum from January 20, 1904, to October 4, 1908, the date on which that judgment was entered; that under the Arizona statute, then and now in force, judgments bore and bear interest at six per cent per annum, and that therefore that judgment for interest bore interest the same as did the sum of \$20,850; and that the amount which thus bore interest at the statutory rate was capable, on the face of the judgment itself, of mathematical ascertainment.

Tenth. That this court has no jurisdiction of this matter at all. This point is argued in the brief on the motion to dismiss.

Statement Preliminary to Argument.

We have filed a motion to dismiss the appeal in this case on three grounds, two jurisdictional and one on the ground that, the case having been before this court on an appeal upon the merits, and having been decided and remanded for "further proceedings not *inconsistent* with the opinion of this court," and a judgment having been entered by the lower court in accordance with that decision, the second appeal is frivolous.

We have filed a brief in support of these three motions and have there made a short statement of the case. That brief is entitled "Brief of Appellee Louis Zeckendorf on Motions to Dismiss."

Hiram W. Fenner, receiver, the other appellee in this case, has also filed a brief entitled "A Brief for Hiram W. Fenner, Receiver of Silver Bell Copper Company, a Corporation, Appellee." These two briefs cover many questions which will be referred to or argued in this brief, and we will endeavor not to multiply the work of this honorable court by rearguing them in this brief any more than seems to us necessary in the presentation of the appeal on its "merits."

Appellants in this case served upon us on October 12, 1915, and filed in this court on the same day, "Reply Brief of Appellants on Motion to Dismiss" and "Brief of Appellants." These are the only two briefs so far served on us by appellants.

While we could complain of the failure of appellants to serve these briefs upon us at an earlier date, we fear that our doing so might delay the trial of the case, and for that reason we are writing this hasty brief in reply to those of appellants. We ask the court to excuse the haste with which this brief is gotten together and formulated.

The reply brief of appellants on the motion to dismiss states that appellants have applied to the Honorable Justice

Joseph McKenna, of this court, for a writ of error to the Supreme Court of the State of Arizona, and ask that, with our consent, this court shall grant said writ of error and order the consolidation of the cases upon the transcript already here on appeal. To this we feel that we cannot consent, for the reason that we have not had sufficient time to consider the matter from the new aspect of the case, on writ of error as distinguished from its form or aspect as an appeal.

Appellants assigned, in accordance with the laws of the United States, certain errors, which are found in the transcript of record on pages 195 to 206, but in their brief appellants practically abandoned these assignments of error, with the exception of the first one, and set up and make assignments of error essentially differing from those contained in the transcript of record. For this reason we urge that appellants have waived and abandoned all the assignments of error contained in the record, with the exception of assignment number one, and that this honorable court cannot consider any of the assignments of error made in the brief of appellants except assignment number one. We take exception to the "statement of the case" made by appellants in their brief. For, while in many respects it is founded upon the pleadings and the findings of fact heretofore acted upon by this honorable court, in many others it is not founded upon any *record* of this or any other court in which this case has been tried. Many statements are not justified at all, or are supported only by parts of the evidence given upon the trial of the case and not made a part of the record by any findings of fact, or by *ex parte* affidavits filed in the case, and which were not made any part of the evidence or in any way any part of the *record* in the case. Among such unauthorized statements are the following, viz: That Steinfeld personally arranged the banking credit on the Pacific Coast, etc., of Zeckendorf & Company; that under Steinfeld's management the mercantile business became a large and prosperous one. These are found on page 2 of said brief. On pages 2 and 3 is the statement that Neilson sold 300

shares of stock to Steinfeld and the Silver Bell Copper Company jointly, etc., while the record and judgment in this case are that the 300 shares of stock were bought solely for the Silver Bell Copper Company. On page 3 of the brief it is stated that Steinfeld wrote Zeckendorf on three occasions, urging the importance of acquiring the title to the English group, etc. This is not justified by the record in this case. Many other similar misstatements are found in their statement of facts; and on pages 6 and 7 are statements as to the contents of a complaint filed by Zeckendorf in the Superior Court of California, which is not contained in the record of this case. Without further enumerating them there are several other similar statements made by counsel, intended to give an equitable standing to Steinfeld's case, that the record in this case does not justify. While it is true these statements may not be material, at the same time they are misleading and can serve no good purpose in the case.

We do not understand that the facts of the primary litigation itself are at all material, for the reason that all such facts are now matters of final adjudication by this honorable court. However, if this honorable court should desire to know what the facts of the case are, we then most respectfully will refer it to its own statement of the facts, prepared by Mr. Justice Day, and appearing on pages 448 to 457, inc., of 225 U. S.

Opening Statement on the Merits of the Appeal.

In our brief on the motion to dismiss we have very briefly argued most of the questions on their merits presented by the assignment of errors and the brief of counsel for appellants. Counsel have made up a statement of the facts of this case which, somehow, we are unable to recognize as being true or correct and which do not correspond to that stated by this honorable court in its exhaustive opin-

ion filed on the former appeal (*Zeckendorf vs. Steinfeld*, 225 U. S., 445 to 459, inc.). Mr. Justice Day prepared the statement and wrote the opinion.

At the outset of this argument we desire to say that on March 15, 1912, some three and one-half and more years ago, we were before this honorable court *as and being the court of LAST RESORT*, arguing the all-important question as to whether Albert Steinfeld had in January, 1904, misappropriated a great fortune from the Silver Bell Copper Company, and whether or not he should pay that money back to that corporation. The ultimate question for decision by this honorable court was this: to whom did that fortune of nearly a quarter of a million of dollars belong, Albert Steinfeld or the Silver Bell Copper Company? The case came to this court from the Supreme Court of the Territory of Arizona on elaborate findings of fact. On that statement of facts this honorable court, on June 7, 1912 (still more than three years ago), decided that ultimate question involved, and, as THE COURT OF LAST RESORT, *decided* that that money was the property of the Silver Bell Copper Company, and that Albert Steinfeld had wrongfully taken and appropriated it to his own use. Now, after a lapse of over three years, we are again before this honorable court in that same case, on an appeal by Albert Steinfeld from a ruling by the judge of the Superior Court of Pima County, Arizona, *that he was bound by the decision of this great court*, AND HAD NO POWER TO REVERSE IT; the very point on which counsel for appellants demanded a retrial and redecision by the Superior Court of Pima County, *being the identical point* on which his honor Mr. Justice Day had reversed the decision of the Supreme Court of Arizona.

Notwithstanding the supposed finality of the decisions of this great court on all questions involved, Albert Steinfeld has been and is still able to hold on to and to use that fortune, not his, now approximating a half million dollars. The law charges him with 6 per cent per annum simple in-

terest for that use, without any charge for the interest not paid, but itself continued to be used. That interest alone which is unpaid, and which he is now using, *and on which there is no charge*, now amounts to much over one hundred thousand dollars. This court will take judicial notice of a fact so universally known, as that money in the great southwest is worth more than six per cent per annum simple interest, with no periods of payment or rest, and no charge for nonpayment.

As above stated this court, directly, squarely and expressly, in rendering its decision in this case in June, 1912, passed upon every question involved in the decision of the ultimate question as to who owned that money. It, as above stated, directly *decided the very identical question* which Albert Steinfeld and his counsel later demanded should be retried and reddecided by the Superior Court of Pima County, and because it would not these successive subsequent appeals have been taken, and we are here in that same case a second time.

In addition to appealing from the refusal of the Superior Court of Pima County, to retry and reddecide the identical questions decided in this case, by this honorable court, and which is their principal appeal, Albert Steinfeld and his counsel have "appealed" from that part of the judgment which is not against him or any of the other defendants whom they then represented, but against the Silver Bell Copper Company, that corporation by its receiver not appealing, but accepting and standing for the whole judgment, even that part against it last referred to, for attorney's fees and costs. The other principal point involved in this "appeal" is a question of interest. That "appeal" is because the court, following the statute of Arizona, which will be found hereinafter set out, figured and allowed interest on the judgment which had been theretofore rendered against Steinfeld and affirmed. The remainder of the "appeal" mathematically resolves itself into nothing. The very state-

ment of this case as it is *now* before this honorable court on this appeal, when read in the light of Mr. Justice Day's opinion and this court's decision on the former appeal, compels one to stop and ask, Why and how can it be done? The answer to the question "why?" is written in the Arizona market values of the use of money. The answer to the question "how?" is by appeals and supersedeas bonds, taking all chances of the imposition of penalties for frivolous appeals.

The Refusal of the Trial Court, on the Coming Down of the Mandate by This Court, to Grant a New Trial.

Under the heading "Proceedings in the Case Continued" on page 12 and from there on in said brief under this heading to page 39 appellants discuss the alleged error of the lower court in refusing to grant appellants a new trial of this case, contending that the opinion and mandate of this honorable court on the first appeal either authorized a new trial or gave to the lower court discretion to grant a new trial, and that as the lower court refused to grant such new trial and declared that it had no discretion in the matter, but under the mandate of this court was required to refuse to grant a new trial, there was error.

Appellants recognize that the rules and decisions of this honorable court have established that when a matter has once been before this court on appeal all matters decided by this honorable court or involved in its decision are finally settled and cannot be re-examined in any lower court, nor can any motion for a new trial be granted by the lower court. Appellants, however, endeavor to distinguish between this case and those in which the above rule was recognized and enforced by this honorable court by stating that that rule of decision by this court only applied in those equity cases wherein all the evidence, as opposed to the findings of fact, was brought before this court on the appeal; and appellants base their whole argument upon the alleged

error of the lower court in not granting them a new trial upon this so-called distinction. We maintain that this is so frivolous an argument that even a slight examination of the decisions of this honorable court will show that there is nothing upon which to base it. This case came before this honorable court on the first appeal upon findings of fact and not upon the evidence at large, because under the laws of the United States all cases coming up from territorial courts come up on findings of fact and not upon the evidence at large. This is also true in all cases coming to this honorable court from the Court of Claims, and yet in the decisions of this honorable court are to be found numerous cases coming up from the Supreme Court and from the Court of Claims upon the second appeal in which this Court has reaffirmed in the strongest language its position that: "It is the settled law of this court as of others, that whatever has been decided on one appeal or writ of error cannot be re-examined on a second appeal or writ of error brought in the same suit. The decision has become the settled law of the case." This is a quotation from *Thompson vs. Maxwell Land Grant Company*, 168 U. S., page 451, on second appeal to this honorable court from the Supreme Court of the Territory of New Mexico. The same rule is as strongly affirmed by this honorable court in cases coming up on findings of fact from the Court of Claims.

United States vs. New York Indians, 173 U. S., 464.

This last case expressly states "the same rule applies to writs of error."

We also refer the court to its decisions cited by the Supreme Court of the State of Arizona (Tr., pages 185 to 189) in its opinion dismissing the appeal.

See also

U. S. vs. Camou, 184 U. S., 572; 46 Law. Ed., page 694.

However, we believe it is unnecessary to further argue this point, for even a greater number of decisions of this court evidence the fact that there is no distinction between cases here on appeal where the facts are presented by findings in the nature of a special verdict from those where the facts are brought up by a full transcript of the evidence. In support of this statement we cite the following cases coming up from territorial courts and from the Court of Claims, in which cases this court, after a consideration of the case on appeal, upon the law and facts of the case, has reversed the action of the lower court and instructed the lower court to enter a final and definite judgment upon the law and the facts.

Stringfellow vs. Cain, 98 U. S., 610; Law Ed. 25, p. 421.

Ivinson vs. Hutton, 98 U. S., 79; Law Ed. 25, p. 66.

First National Bank, etc., vs. County of Yankton, 101 U. S., 129; Law Ed. 25, p. 1046.

Tilton vs. Cofield, 93 U. S., 163; Law Ed. 23, p. 858.

Stofella vs. Nugent, 217 U. S., 499; Law Ed. 54, p. 856.

Jane Quinn vs. The United States, 99 U. S., 30; Law Ed. 25, p. 269.

Union Pacific R. R. Co. vs. U. S., 99 U. S., 402; Law Ed. 25, p. 274.

United States vs. Sanford Perryman, 100 U. S., 235; Law Ed. 25, p. 645.

United States vs. Murray, 100 U. S., 536; Law Ed. 25, p. 756.

United States vs. Shrewsbury, 90 U. S., 508; Law Ed. 23, p. 78.

United States vs. Landers, 92 U. S., 77; Law Ed. 23, p. 603.

United States vs. Dickelman, 92 U. S., 520; Law Ed. 23, p. 742.

Garfield *vs.* United States, 93 U. S., 242; Law Ed. 23, p. 779.

Lake Superior & M. R. Co. *vs.* United States, 93 U. S., 442; Law Ed. 23, p. 965.

There were but two matters of practice in which the Stofella *vs.* Nugent case, above cited, differed from the one at bar. In the Stofella case a final judgment and decree settling all matters included in the controversy was rendered by each court which considered it. Judgment in the lower court was rendered for the defendant. Plaintiff appealed to the Supreme Court of the Territory of Arizona. The Supreme Court of Arizona said: "The evidence in the case is not before us, the record presenting for our consideration the question simply whether the conclusion of law and the judgment rendered thereon are supported by the findings. The court found as facts," etc. After a full consideration of the facts, as shown by the findings of the lower court, the Supreme Court of the Territory reversed the judgment of the lower court, with directions to that court to enter judgment absolute for the plaintiff. The defendant then appealed to this honorable court. This court declared the case to be one in equity; considered the findings of fact of the district court (presumably adopted as in this case by the Supreme Court of the Territory), and on the facts ordered "judgment reversed with directions to affirm the judgment of the district court."

Stofella *vs.* Nugent, 217 U. S., 499; Law Ed. 54, p. 856, *supra*.

In the case at bar a final judgment and decree on the whole case could not be rendered because it is a stockholders' suit; a receiver had to take possession of the property and wind up the affairs of the corporation and certain accountings were to be had. Therefore, instead of this honorable court giving instructions for the entry of a certain definite and a determined decree and judgment, it reversed the case

and sent it back with instructions which were in effect an affirmance of the original judgment and decree entered by the lower court upon the first trial, instead of the judgment and decree entered by said court upon the second trial.

This *Stofella vs. Nugent* case is particularly referred to in this brief, for it points out the fact that the attorneys for appellant were not ignorant of the ruling of this court in such matters. It appears from a reading of the *Stofella vs. Nugent* case that Mr. Eugene S. Ives, one of the attorneys for appellant in this case, was the leading attorney for one of the parties in the *Stofella vs. Nugent* case.

We have discussed this point to some extent in our brief on motion to dismiss, on page 20 to page 28, to which pages we hereby refer. Hiram W. Fenner, receiver, the other appellee in this case, has discussed the same question on pages 5 to 10 and on pages 12 to 17 of his brief, to which we also refer.

Every argument made by the appellants on this subject was answered years ago by the decisions of this honorable court, and no excuses exist for their appealing to this honorable court for a new determination of the question.

In considering exactly what was decided by this honorable court on its first appeal we think it best to first point out the relation of the different sums of money involved in this appeal to the decision of this honorable court on first appeal.

The pleadings in this case plainly show that the \$33,111.00, being the dividend declared upon the 300 shares of stock, and the title to the said 300 shares of stock was the only question or sum of money involved in the second cause of action, all other sums of money, viz., the \$145,743.75, the proceeds of the \$100,000.00 note, and the \$25,750.00 affected by the Franklin garnishment suit, were each and all included in the first cause of action.

This honorable court, after considering the merits of the case, *decided that all the money in issue in this case as made by the pleadings was the property of the Silver Bell Copper*

Company, and was wrongfully taken and withheld from it by Albert Steinfeld, as the lower court had already determined that the \$33,111.00 item was wrongfully detained by him.

This court went no further in its decision than to decide the above points, and under the pleadings nothing further could be asked by Steinfeld. The lower court went further for the purpose of doing equity to both the appellant and the appellee. It gave Steinfeld credit for the sum of \$18,117, which he had paid out in securing the title to the mines, the sale of which resulted in the acquiring by the corporation of title to the \$145,743.75 and the \$25,750.00 and the \$100,000 note, and this deduction of \$18,117 was made from the \$145,743.75, leaving a balance on this amount of \$127,626.75, as shown by the second paragraph of the judgment rendered. Strictly speaking, the lower court was not commanded or required to do this by the decision of this honorable court, but appellee thought it was the equitable thing for the court to do, and the judgment against Steinfeld was thereby reduced to the extent of \$18,117, and therefore the action of the court could not be complained of by appellants.

We would like very much if this honorable court would read the opinion above referred to, by the Supreme Court of Arizona, dismissing the appeals to that court, and from which order of dismissal this appeal is taken. This honorable court will observe with what care that honorable court compared the judgment here complained of with the decision and opinion of this honorable court theretofore given in the case, that court, after the most careful examination, finding that the judgment given and entered by Judge Sutter was in every way in accord with the opinion and decision of this honorable court.

ARGUMENT.

But assuming for the sake of the argument, and that alone, that the lower court was vested with judicial discretion to grant or refuse a new trial, in spite of the decision of this court, then should a new trial on the merits have been granted Albert Steinfeld and his co-defendants?

It seems to us that an analysis of the situation shows appellants' claims in that regard, to be almost a contempt of the decision of this honorable court. Their claim on the merits, that they should have had a new trial is based on the contention that they never had had their "day in court" on the question of the intent of the stockholders of the Silver Bell Copper, in the action taken by them on December 26, 1903 (Finding XXXII, Transcript, pages 393 et seq., folios 960 to 983, inclusive). It will be remembered by this honorable court that the plaintiff in the action (appellee here), in his third amended complaint, alleged with reference to the stockholders' meeting of December 26, 1903, "that at said stockholders' meeting it was voted to rescind said resolutions above set out and said contract of May 20, 1903, and no other or different contract or resolutions, and if the action taken at said stockholders' meeting had the effect, on its face, of rescinding any other resolutions or any other contract adopted on said 20th day of May, 1903, or under date thereof, particularly the contract entered into by the acceptance of said offer of Albert Steinfeld as to the payment to him of said sum of \$18,117 and the payment thereof, such action was a mistake on the part of this plaintiff and was not intended as such, *and was a mistake on the part of the other stockholders of said company present at said meeting*, and was not intended as such" (Third Amended Complaint, filed January 4, 1908, Trans., page 260, folios 609 and 610). As to date of verification and filing see folio 634. This amended complaint was filed after the first decision by the Supreme

Court of Arizona, which counsel claim "put them to sleep," being the first decision by that court referred to and commented on by Mr. Justice Day in the opinion of this honorable court given in its decision on the former appeals, 225 U. S., 445. Defendants demurred to and answered this third amended complaint (Trans., pages 270 *et seq.*, folios 635 to 715, inclusive). This answer was filed January 6, 1908. The denials with reference to the actions of the directors and stockholders at their respective meetings of December 26, 1903, are found in folios 686, page 288, to folio 692, inc., page 290. It will be observed that the defendants not only categorically deny the allegations of the third amended complaint above quoted, but also go further and allege affirmatively as follows: "And for a further and separate defense to the said alleged mistake, the defendants allege that such mistake, if any occurred, was made by the plaintiff, and the fact that he had made such mistake was discovered by the plaintiff more than one year, etc., etc." (Tr., folio 692). In this same part of their answer (folios 691 and 692) the defendants, after denying any mistake or intention, as alleged, on their part, also affirmatively allege as follows: "And the defendants allege that the action taken by the said plaintiff at said stockholders' meeting and his vote upon the resolution thereon, was made after a full exposure to him and his counsel of all the facts, minutes, resolutions and agreements which had been made or passed by the said Silver Bell Copper Company, and that said mistake was not mutual, and that said Silver Bell Copper Company intended to make a full and complete rescission of the said contract and resolutions passed on said 20th day of May, 1903." All affirmative allegations in the answer were stipulated to be deemed denied (Transcript, folio 715, pages 298 and 299). It will thus be seen that the issue of intent was squarely presented by the pleadings, a truly new issue formulated and presented after the first decision by the Supreme Court of the Territory, in and by which it had reversed the first decision of the lower court on that very question of intent without

its being so squarely presented by the pleadings as they then stood. The only competent evidence which could have been offered and received of what was the actual intent of all the parties, was the evidence of what was said and done at the stockholders' meeting referred to, together with evidence of the "surrounding explanatory circumstances," which in this case would mean evidence of what had gone before and of what immediately connectedly followed. Complete evidence of all the "surrounding explanatory circumstances" was offered and received, and full and complete findings in extreme detail, were made therefrom and thereon. This is demonstrated not only by the record before this court on the former appeals, but also by the findings which are made a part of the record on this appeal. The court having found in detail on all the facts of the case which preceded, and which followed the meetings of December 26, 1903, the only competent evidence of the intent of the various parties at those meetings was the evidence of what was actually said and done thereat, with the evidence of all documents there present or referred to. A phonographic report of what was said and done at that meeting was made and kept and recorded as the minutes of the meeting and was offered and received in evidence. That phonographic report was adopted by the trial court and by the Supreme Court of Arizona as a finding of fact of what actually occurred and of what was said and done. The question of intent thus became a matter of conclusion to be drawn by the judge, *as such*, from this documentary record evidence. This record was of that probative character which is referred to in the decisions cited by counsel as being the kind of probative evidence properly incorporated in a finding. But we do not have to argue that point. Finding XXXII (Tr., pages 325 *et seq.*, folios 787 to 810, inc.) states "the probative facts from which the ultimate fact can be determined." *That is a matter of decision by this honorable court in this case.* This honorable court not only accepted this as being a sufficient and a proper finding, but on it, *as being such*, it reversed the decision of

the Supreme Court of the Territory of Arizona. In its opinion, per Mr. Justice Day, this court, speaking with reference to this very matter, said:

"We cannot agree with the Supreme Court of Arizona that the effect of this stockholders' meeting was to rescind so much of the former action as vested the proceeds of the sale in the Silver Bell Company. Nor can we agree, as the court held, that, if the parties did intend to rescind only the former action as to the custody of the proceeds of the sale, they made a mistake only as to the legal effect of the rescinding resolution. On the other hand, we think it is apparent from a consideration of the proceedings of that meeting, *which the Supreme Court of Arizona has made a finding of itself*, that the objection of Zeckendorf, the principal stockholder other than Steinfeld, was to so much of the former action as pertained to the turning over of the proceeds of the sale to Steinfeld to be held by him for his indemnity. At the meeting no disposition was manifested to give Steinfeld the ownership of the proceeds of the sale of the English mines nor to treat any modification of the former action as a rescission of the entire matter.

"The discussion at that meeting throughout shows that the object of Zeckendorf was to get the money and the proceeds of the notes into the hands of a treasurer of the company who would give security therefor, and to have the entire proceeds of the sale divided among the stockholders. There was no intimation that the money or notes then held by the treasurer would be taken from the Silver Bell Company and one-half thereof turned over to Steinfeld as the vendor of the English group of mines. As the counsel of Steinfeld said:

"We are unwilling to admit that we did not have the right to this money. We still assert that this resolution and agreement was honest and valid, and that Mr. Steinfeld, under it, had the right to this money, and had the right to act as he has done. But since you attack it, we are willing to agree to pass a resolution in the language of your prayer in which

we will rescind the resolution and agreement, and *relinquish all right whatever to the personal custody of that money, and turn it over to the company.*

"Now, I drew a little resolution, which I would suggest one of you gentlemen (I am not a member of the board) should offer." (*Italics the court's.*)

"Thereupon the resolution in the following language was offered:

"*Resolved*, That the agreement executed on May 20th by the president and secretary of the corporation, the Mammoth Copper Company and Albert Steinfeld, be and the same is hereby rescinded and that the said agreement and resolution passed on said day be declared null and void."

"After the resolution was offered and before the vote was taken, counsel for Steinfeld said further:

"We are acquiescing in your demand. * * *

"We will now organize as a stockholders' meeting.

"Our desire is in good faith to rescind that resolution, *but we will never admit we acted wrongfully in taking the money; you attacked the resolution, and we are willing, if you wish, to rescind it.*" (*Italics the court's.*)

"What resolution does this refer to? Certainly not the one (1) ratifying and approving the sale to the Imperial Copper Company; nor the one (2) accepting Steinfeld's proposition and authorizing payments to Steinfeld and those from whom he had purchased; nor (3) the payment of commissions. But manifestly all parties had in mind so much of the resolution as referred to the right of Steinfeld to continue to hold the proceeds of the sale, cash and notes, for his indemnity."

"At the stockholders' meeting, the entire 1,000 shares, representing those belonging to Zeckendorf, Steinfeld, Shelton, and Curtis, were all voted in favor of the resolution.

"We will not stop to recite the other parts of the *long finding* which includes all the proceedings of this meeting. At the end of the findings of fact in this connection the Supreme Court of Arizona makes this significant statement:

"In the stockholders' meeting held on the 26th day

of December, 1903, hereinabove set out, plaintiff in voting to rescind said agreement of May 20, 1903, and the resolution hereinabove mentioned, did not understand or know or believe that anybody claimed or would claim that the action taken on that day by the stockholders of the Silver Bell Copper Company, would operate to give either Albert Steinfeld or the Mammoth Copper Company any right or claim to any of said proceeds of said sale, *nor did the directors in good faith understand or believe that the stockholders intended to instruct them to rescind any portion of the agreement and resolution other than that relating to the indemnity agreement hereinbefore mentioned.*

"It is argued that this is but a conclusion and not in any proper sense a finding of fact. If this be so, we think it is the proper conclusion from the facts stated. In our view it cannot be reasonably maintained that, in passing the resolution, when it is read in the light of the proceedings at the meeting, and the known facts surrounding the parties at the time, the stockholders intended to rescind any more of the transaction than related to the indemnity agreement. On the other hand the fair inference from the proceedings at this meeting leaves no doubt in our minds that the stockholders intended to affirm the previous transactions except so far as they related to Steinfeld's right to hold the money and notes for his indemnity, and that Steinfeld acquiesced in such modification as one of the stockholders." (Italics the court's.)

But this is not all, as the record before the court on the former appeal will show. After this honorable court had decided the case on the grounds stated in its opinion, from which we have thus quoted, the defendants (including the appellants now here) filed a petition for rehearing, in which they *presented the identical arguments* here presented to this court in the brief for appellants.

In that petition for rehearing, recognizing that the question of interest had been decided by this honorable court against them, they petitioned this court to give them an-

other opportunity, another "day in court," on that question of their intent, but that petition was denied, *this honorable court thereby deciding* that the defendants had had, and legally and finally so, their "day in court" on that question of intent. To quote from that petition for rehearing would be largely to reprint in this brief the arguments on this point now presented in appellants' present brief. Not only this, but these same counsel for these same parties in this same action, before this same court, argued this same question in this same way, when the case was before this court for argument before its decision. As heretofore suggested, the only competent—in other words, legal—evidence that could or would be admitted as to the intent of the several stockholders at this all-important meeting was the record of what was said and done thereat and of the documentary evidence before it. With this evidence complete and in detail, properly and legally before it, as and being a finding by the Supreme Court of Arizona, and *accepted and acted on by this court as such*, it *judicially* drew its conclusion as to the intent to be inferred therefrom, and *judicially decided* that question, and thereafter affirmed that decision by denying the petition for a rehearing. With this record of the *judicial action and determination by this honorable court*, which record they so largely helped to make, counsel had the temerity (and we use the word advisedly) to go before the Superior Court of Pima County, Arizona, and to demand of that court that it, on this the only evidence admissible, and for itself, *in spite of the decision by this honorable court, judicially determine this same question in this same case*; and because that court had the judicial sense to know that *it was bound by the decision* of this honorable court in this case, defendants *claim* to be aggrieved. Are we going outside of our rights when we assert, as we do, that the inspiration for that "claim" was and is the desire for this second long delay, which has added years to the time of ultimate recovery for the great wrong committed by Albert Steinfeld, as set forth in the findings in this case?

With the record of this court's decision before them, with their petition for rehearing but recently composed by them, with their recollections of their then but recent arguments before this court, how could counsel for defendants (appellants) believe or even suspect that the Superior Court of Pima County, Arizona, had the judicial right to retry and then redecide for itself the very question decided by this honorable court?

This case was begun in February, 1904. It is not yet ended. During all of these eleven, and now nearly twelve, years Albert Steinfeld has been using, as his own, several hundred thousand dollars which this honorable court decided was not his, but the property of the Silver Bell Copper Company. We present the question squarely to this court, Is this appeal for delay—in other words, frivolous? If it is, then are we not right in asking that the full penalty therefor be imposed, not only because of the infringement of the rights and dignities of this great court itself, but also because by this appeal Albert Steinfeld has caused and is causing the Silver Bell Copper Company a tremendous expense and great financial loss?

As we have elsewhere stated in this brief, there was but one ultimate question for decision by this honorable court on the former appeal, viz: To whom did the money and the notes and the stock belong which Albert Steinfeld had taken and converted to his own use? This court *decided that all that money belonged to the Silver Bell Copper Company*, and that Albert Steinfeld had no right thereto. *That was what was decided.* All else contained in the opinion *were the reasons for that decision.* Everything that directly or indirectly went to that ultimate question of ownership was involved in that decision, and ever since has been *res adjudicata* as between the parties to this case. Notwithstanding that ultimate final decision by this court, Albert Steinfeld, for now nearly three years since its rendition, has been able by means of appeals and the giving of supersedeas bonds to retain in his possession and to use as

he would the great fortune which he so wrongfully took from the Silver Bell Copper Company, of which he and his two "dummies" were the sole directors (Findings, Tr., folios 724 and 725, 829 and 835).

The Question of Attorneys' Fees.

The trial judge and the Supreme Court of Arizona found as an ultimate fact "that ten per cent of the amount for which judgment is *finally given* in this action is *and will be* a reasonable amount to be allowed plaintiff as a charge against the Silver Bell Copper Company as attorneys' fees for bringing and prosecuting this action for its benefit" (Finding of Trial Court, Tr., folio 834, page 343, and of Supreme Court of Arizona, Tr., folio 1007, page 411).

The lower court gave judgment in favor of plaintiff and against the Silver Bell Copper Company for ten per cent of the amount for which it then gave judgment against Steinfeld in favor of that company. That judgment was appealed from by Steinfeld and his codefendants to the Supreme Court of Arizona and again to this court, and is the judgment involved in that part of the former appeal which was taken by Steinfeld. This court affirmed that judgment. This was the judgment on the second cause of action. It is, therefore, *the law of this case* that plaintiff is entitled to recover judgment in this case against the Silver Bell Copper Company for fees of his attorneys in the amount found from the evidence to be reasonable. In other words, it is the law of this case that plaintiff is entitled to judgment against the Silver Bell Copper Company as fees for the attorneys who prosecuted the case for its benefit in an amount which will equal ten per cent of the amount for which judgment is finally given.

**These Appellants Had and Have No Right to Appeal From
the Judgment as to Attorneys' Fees.**

The judgment for attorneys' fees and plaintiff's costs is *against the Silver Bell Copper Company* and not against any other defendant. The lower court appointed a receiver of all the business, property, and assets of the Silver Bell Copper Company. That order was affirmed by the Supreme Court of Arizona and again by this court, and upon the coming down of the mandate from this court and the consequent re-entry of the judgment by the lower court that order was confirmed. The receiver thus appointed thereupon qualified, since which time he, in law, has been and is the Silver Bell Copper Company and the only party vested with legal power or authority to act for or in its name, or to appeal from any judgment rendered against it, or to take any action on its behalf. When the receiver qualified as such, all power and authority of the directors, attorneys, and other agents of the corporation thereupon *ipso facto* ceased. The Silver Bell Copper Company could not thereafter appeal or take any other action except through and by the receiver. After his appointment and qualifying and the taking possession by him of the books, papers, and other assets of the corporation, he, under proper authority, therefore, was the only party who could create a liability or incur an obligation against the corporation or chargeable against its assets. To suppose the right of appeal from a judgment against that corporation to be still in the officers thereof would be to assume that they were still vested with power to incur liabilities against the corporation and its assets. The power to appeal carries with it the power to incur all necessary obligations in order to prosecute that appeal, including attorneys' fees, printing, giving of bonds, etc., and even such penalties as the appellate court might impose. The very theory on which the receiver of this corporation was appointed was that the directors and officers of the cor-

poration could no longer be entrusted with power over its affairs, property, and assets. Such was the express findings of the trial court and of the Supreme Court of Arizona (Finding XL, folio 3835, District Court, and 1008, Supreme Court).

The receiver has not appealed, nor has he authorized or empowered any one else to appeal from that part of the judgment in question which is against him. If the officers of the company had desired to appeal from that part of the judgment which was given against the corporation, namely, that part in plaintiff's favor and against the corporation for his attorneys' fees and costs, then they should have made proper representations to the court appointing and controlling the receiver, and asked either that the receiver be directed to appeal or that they be allowed to appeal in his name for the benefit of the corporation. It would have then become a matter of judicial discretion on the part of that court to allow or disallow that request. But no such action was taken, and we submit without necessity of citation of authority to sustain us that that part of the appeal attempted to be taken from the judgment in plaintiff's favor and against the corporation is without power of accomplishment, and therefore without right. In addition to what is here said, we call this honorable court's attention to the fact that the receiver by his brief on file herein is sustaining that judgment.

The Attorneys' Fees Allowed Were Proper.

Notwithstanding that we are confident that this court will hold that there is no appeal from the judgment against the corporation for attorneys' fees and costs because all authority to take that appeal was vested in the receiver, we will nevertheless argue the merits of the question as though it were legally before this court.

In addition to what we have said as to the general rule, the receiver as a matter of fact was actually substituted as party

defendant for the Silver Bell Copper Company (Transcript, page 170). The judgment for attorneys' fees and costs is against him. He has taken no appeal.

While it is true that the lower court in 1908 gave judgment but for \$2,652.20 attorneys' fees, being 10 per cent of the amount for which judgment was then given, it did find, as we have heretofore quoted, that plaintiff should recover 10 per cent on whatever amount for which judgment might be finally given.

The question of the proper amount to be allowed attorneys for the work done in this kind of a case is one entirely within the discretion of the lower or trial court, and unless his allowances on their face show clear breaches of his judicial discretion his actions in that regard will not be disturbed by the higher tribunals.

Can it for an instant be claimed that the allowance for attorneys' fees, up to the date of the entry by Judge Sutter of the judgment here complained of, was too great for the tremendous work, something then over eight and one half years of it, that had been done for the benefit of the corporation in this case? This court will bear in mind that when that judgment was entered nearly nine years of this litigation had already passed; several more have gone by since then. In those nine years the attorneys for plaintiff had not only prepared the pleadings and appeared on all those law and motion matters and hearings that this court can well imagine took place, but they had tried the case once, gone before the Supreme Court of the territory where the case was improperly reversed, as this court afterwards decided, then a second trial, a second appeal to the Supreme Court of the territory, this time by plaintiff, arguments and petitions for rehearing there, an appeal to this court with its decision in plaintiff's favor and the work subsequent to this court's decision in the Supreme Court of the State where days of argument took place at the instance of defendants in their endeavors to get a new trial ordered, and then the long bitter fight before the Superior Court in order to get

the decree entered without another trial. Is this court prepared to say that the allowance thus made is excessive as against the corporation that recovered as the result of that nine years of continuous fighting a collectable judgment for over four hundred thousand dollars? It is not for Albert Steinfeld, whose wrongful acts, in the first place, and whose continuous fightings, in the next, are the sole causes for this expenditure, to complain, and for that reason, if for none other, we insist that there is no appeal before this court from that part of the judgment here being discussed. Albert Steinfeld has been able to keep in his hands for his own use and benefit, notwithstanding judgments and decrees, even those of this the greatest court in all the world, a vast fortune, the property of another legal person, for approaching thirteen years, and yet *he* complains at the allowance for attorneys' fees to the attorneys whose work will eventually make him give up that money! We believe that in all justice and equity, if there be any legal way whereby Steinfeld can be made to make the corporation whole, even as against this expense, that it ought to be adopted.

Under the heading "Additional Errors in Judgment as Entered" (Appellants' Brief, page 39) counsel attempt to show what they claim to be "additional errors" in the judgment of the trial court as entered.

Credit for Francis and Volkert Payment.

We take it that at this late date it is not necessary to cite authority to the effect that if a defendant claims a credit against the party owing him, particularly growing out of the transaction involved, he must plead that credit, or rather the facts on which the claim therefor is based, or be *forever foreclosed* from asserting the claim. The action at bar in legal effect was an action by the Silver Bell Copper Company against Albert Steinfeld for moneys and notes or proceeds thereof. The transaction in question directly involved all obligations of Steinfeld to the corporation, and of the cor-

poration to him growing out of the acquiring of the titles to and the ownership of certain mines and stock, and of the right to the proceeds from the sale of the mines. If Albert Steinfeld claimed any credit, set-off, or counter-claim against the corporation, particularly growing out of or connected with that transaction involved, it was his duty to properly plead it as such, in this action, or be forever foreclosed from asserting it. Of such a character were the claims for money paid to Francis and Volkert and the money now claimed to have been held by him under the Franklin garnishment. Counsel quoted to this court extensively, but disconnectedly, from a judgment and pleadings that have no part in the record, because the judgment referred to was reversed and a new trial had, and the pleadings were amended. But no matter what findings in Steinfeld's favor may have been made, not called for by the pleadings, he cannot complain of them, nor take advantage because of them, now.

Notwithstanding that Steinfeld never did plead or claim as against the corporation that he had paid the \$12,700 to Francis and Volkert for the corporation, nevertheless as an act of justice, the court, at the instance of plaintiff, allowed him the credit to which it believed he was equitably entitled. The very theory of his defense as set forth in his answer, and as made by him, up to and including the decision of this honorable court, was that he *did not make that payment for the corporation but for himself*. Even with that theory he could have, and if he ever would want the credit should have pleaded that if the court ultimately determined that he had no right to take the money and notes sued for in this action that then and in such event he should be entitled to a credit for the money paid Francis and Volkert. There never was a claim asserted by Steinfeld, *at any time or any place*, after the misappropriation by him of the notes and money involved herein, that he was entitled, or under any circumstances or conditions would be entitled, to any credit for that payment to Francis and Volkert or to anybody else, on the contrary, the only deductions that

can be made from the pleadings on the part of Steinfeld in regard to that payment are to the effect that he is *not entitled to and does not and will not make any* claim against the corporation on account thereof. See the Answer to Third Amendment Complaint, particularly folios 652 to 659, inclusive.

So whatever credit the Superior Court of Pima County saw fit to allow Steinfeld, and did, by the judgment here appealed from, allow him, was in effect a legal gift to Steinfeld without any legal or equitable right in him to complain because it was not large enough. There was not and is no issue regarding it, no finding upon or about it, and it has found its way into this case only, as above stated, as a gift. Furthermore, *it is mathematically correct*. In addition to this it will be observed with reference to this Francis and Volkert matter, the Franklin garnishment matter and all other matters of claimed right to credits that by the judgment complained of Judge Sutter, on the motion of Zeckendorf, appellee, without any legal right in Steinfeld therefor, has made provision for Steinfeld hereafter, in the proper manner, to come before that court and present his account, if any he has, against the Silver Bell Copper Company, and that it will be allowed and paid where correct. Paragraph eleventh of Judgment, Tr., page 100, folio 234.

That paragraph of the judgment is as follows:

"Eleventh. That the said Hiram W. Fenner as said receiver out of the moneys which may be paid to him by the said Albert Steinfeld, and which shall be recovered from said Steinfeld in this action, shall pay to said Albert Steinfeld all sums of money heretofore necessarily paid by the said Albert Steinfeld for and on account of the said Silver Bell Copper Company, *after an account of the same has been presented, audited and approved by this court.*"

The \$25,750 and Interest Involved in the Franklin Garnishment.

If this court will take the whole decree or judgment here complained of it will see that mathematically it amounts to nothing more than this, viz: That Steinfeld should be credited with having that money in his hands as being held under that garnishment with full credit for all money he paid out on account thereof or thereunder, but that if there be any balance thereof which he withholds from the corporation or its receiver after settling the Franklin claim that then, *on that balance, and that only*, he shall be charged interest at the legal rate from the time he made the settlement to the time he paid such balance to the receiver, and that the receiver shall recover that balance with such interest thereon, having execution, if necessary, therefor.

While, as will elsewhere appear in this brief, *we do most strenuously object* to the consideration by this court of any matters, though in the printed transcript, not certified to this court in the legal way by and in the form of bills of exceptions, or otherwise legally authenticated, yet for the sake of appellants' argument only we will recognize the record of the colloquy between court and counsel referred to and quoted in counsel's brief.

The judgment as affirmed by this court entitled Steinfeld to a credit for such sums as he paid out on the Franklin garnishment to S. M. Franklin, and that he pay the balance to the receiver. There was no judgment that he should be allowed credit for any outside sums. It was "such sums" as he lawfully might pay out for the benefit of the Silver Bell Copper Company. The words "such sums" as here used referred to those theretofore described as springing from the liability on the Franklin garnishment. Taking text and context together, in fact it is one continuous sentence, these words could have referred to nothing else. Otherwise Steinfeld, notwithstanding there was a receiver appointed

and qualified, could have done as his attorneys claimed he had done, viz., incurred liabilities and paid out money for the corporation without any authority of court or the receiver therefor. As further evidence that this is the correct construction we again refer to the above-quoted paragraph "eleventh" of the judgment which provides for equitably adjusting matters with Steinfeld, and for nothing else.

There is no force whatever in what counsel, on pages 53 and 54, suggest as to the reasons for the judgment being written as it is. What the plaintiff wanted was a judgment that Steinfeld, thereafter, in a proper proceeding account to the receiver and through the receiver to the court for that \$25,750, getting such credits as he was legally entitled to. The first time that this allowance is assigned as error is in appellant's brief. This, like the \$12,700 payment to Francis and Volkert, and the item of interest thereon, for the first time finds itself injected into this case, in the assignments of error in their brief referred to. At the time the judgment was entered (if we are to act upon the nonauthenticated matters set out in the transcript) counsel for appellants did demand the right, without submitting any pleading or account, to swear and orally examine Mr. Steinfeld in order to prove that he had paid out all of that money. This, of course, was not permitted (Tr., page 143, folio 334, 335, and 336). We have in our brief on motion to dismiss, pointed out the fact that by the findings in this case it was determined that this said sum was the property of the Silver Bell Copper Company, that it was in possession of Albert Steinfeld and that the Silver Bell Copper Company or its receiver was entitled to possession thereof. We have pointed out that the complaint alleges the wrongful appropriation by Steinfeld of this money belonging to the Silver Bell Copper Company; that the answer by failure to deny admits the title of the money as being in the Silver Bell Copper Company and denies Steinfeld's wrongful possession of it, but does not set up any reason of any kind or character for Steinfeld's failure to pay it over to the company. There-

fore under the pleadings the court could do no less than give the Silver Bell Copper Company a judgment therefor, as it did.

We have also pointed out that in this judgment the court refused to issue execution against Steinfeld for the said sum until Steinfeld had had an opportunity to present an account for any expenditures out of said sum made by him for the benefit of the Silver Bell Company. We have also pointed out that the interest computed upon this sum was so computed that on an accounting it resulted in exactly the same state of facts that would result if the lower court, instead of rendering a judgment therefor against Steinfeld, had required him to account therefor; and that the reason the court did not require him to account therefor, by rendering a judgment against him for the money and giving him the right for an accounting, was because the title to the money by the pleadings was in dispute, and the judgment had to settle that title in favor of the Silver Bell Copper Company.

This question is discussed on pages 29 to 36 of our brief on motion to dismiss and on pages 17 to 30 of the brief of Hiram W. Fenner, receiver. The discussion in this latter brief is even fuller than that of our brief on motion to dismiss, for which reason we will not in this brief attempt to more fully go over the ground again.

Interest.

This question is presented from two points of view, viz., the legal and the equitable. As to the equitable, there can be no question but that Steinfeld should be compelled to pay interest on all the money he wrongfully withheld. He has had the use of that vast fortune for thirteen years.

There is no interest item in the sum of \$14,613.11, or in any other sum made *as a net charge* against Steinfeld on account of the \$25,750 referred to. As a matter of mathematics, as well as law, he is charged with interest on such

balance of that sum, if any, as remained in his hands after the settlement of the Franklin suit, and from the date of such settlement to the date when he pays over such balance to the receiver. As we have before shown, this is the net effect of the judgment (Transcript, pp. 98 *et seq.*, folios 229 and 230). The original judgment will be found on pages 346 *et seq.* of the transcript, the part here in question at folio 843.

The second item of interest objected to by counsel is that calculated on the judgment rendered against their client on the second cause of action, affirmed by the Supreme Court of the territory and later by this court. The portion of the original judgment covering this amount will be found on page 345, folio 839, of the transcript, and is as follows, viz:

"Second. That Albert Steinfeld upon the second cause of action in said complaint set forth, pay to the defendant the Silver Bell Copper Company, and that the said Silver Bell Copper Company do have and recover from said Albert Steinfeld, the sum of \$20,850.00 with interest thereon at the rate of six per cent. per annum from the 20th day of January, 1904."

It will thus be seen that judgment was given for an amount equal to the interest on \$20,850.00 at 6 per cent per annum from January 20, 1904, to the date the judgment was entered. That amount was not calculated, but it was as certain as if it had been.

The statute of Arizona provides that interest shall be paid on judgments. It is as follows, viz:

"In the absence of an agreement in writing signed by the debtor, interest shall be paid at the rate of six per cent per annum on money due on any bond, bill promissory note or other instrument in writing, *on judgments*, on money lent, on the sum due on accounts stated, on the sum due from the time it is audited, from the territory, and county, city or village" (Rev. Stat. of Arizona, 1901, par. 774).

The court having given judgment for the amount of that interest, that judgment, for interest like the balance, bore interest from the date of its entry. Counsels' complaint is that by allowing interest on the interest of this judgment, it compounded interest. There can be nothing in this point, for in point of law that accumulated interest was calculated and added to the balance of the judgment on the day of its entry. It was but a matter of mathematical calculation, where all of the factors were stated.

Matters in the Printed Record Not Properly Before This Court.

The printed transcript in this case will be found to contain a vast amount of matter that has no place before this court, even though the appeal here was proper and the case properly before this court for consideration and decision.

We refer first to that from which counsel for appellants have extensively quoted, viz., the alleged colloquy between counsel and Judge Sutter. This will be found commencing on page 114 of the transcript and running through to page 160. Up to this time we had supposed that records of this kind could only be legally brought before this great court on bills of exception, or similar bills, regularly presented, served, allowed, settled, and certified to. But apparently we were mistaken, for we here find a record of discussions, exceptions, statements, etc., printed and presented, though never served on counsel, never allowed or settled, never certified to as such, and never filed in the lower court. We also desire to call this honorable court's attention to the fact that the so-called exceptions on which this appeal is founded and argued are brought to this court, not in legally settled bills of exception, but in *ex parte* affidavits of the defendants and their attorneys. This startlingly unusual form of bringing up the record commences at page 6 of the transcript and there goes to page 96. On page 96 to page 101 is a copy

of the judgment entered by Judge Sutter, and which, we take it, is properly brought to this court. Commencing on page 101 are what purports to be the record of motions made by defendants and their exceptions. Commencing on page 160 and running through to page 169 are purported copies of minute entries certified to by the clerk, but not embodied in any bill of exceptions.

Then follows the record of the substitution of the receiver and his attorney for the Silver Bell Copper Company—page 170. Then follows what purports to be a part of Steinfeld's brief in the Supreme Court of Arizona. This runs through to page 184. Commencing on page 184, thence to page 190, is the copy of the opinion by the Supreme Court of Arizona dismissing the appeal. Then follows certain records on the appeal which may properly have a place in the record as printed. This runs to page 206. Commencing at page 206 is the record of the findings and judgment which were reversed by the Supreme Court of the Territory. This runs through to page 240. What business under any aspect of this case they have here we not do know. Nor is it legally certified to this court. It is not a judgment roll, nor is it brought here by any bill. It is an uncertified, unproven part of the history of this case. Dead matter! Commencing at page 240 of the transcript and running through to page 416 is what purports to be and which we concede to be the record of the pleadings, findings, and judgment of the lower court on the second trial, the record of the second appeal to the Supreme Court of the Territory, the record of the actions by that court on that appeal, and the actions by this court, with its mandate, etc., on the appeal to this court. Then follows the præcipe for this appeal and appellees' objections thereto.

**No Right of Appeal of Writ of Error from Judgments of
State Courts Not Involving Federal Question.**

There is one more aspect of this case which we desire to call to the attention of the court. It was suggested in our brief on motion to dismiss, and suggested only because we believe the proper place for discussing it was in that brief because of its relation to the jurisdiction of this honorable court in this case, that there is no statutory authority for the prosecution of either an appeal or writ of error, from judgments rendered in a State court to this honorable court, unless there is a Federal question involved. There is no Federal question involved in this case, therefore, under the language of the statute there is neither right of appeal nor right to writ of error to his honorable court in this case. On principle this question has been before this court before, and this honorable court has decided that without statutory authority therefor, it is without jurisdiction.

Cleve W. Vandyke *vs.* Cordova Copper Company, 234
U. S., 188.

We state, however, that on principle, it was and is the right of this honorable court to see that any judgment or decree rendered by it shall be properly entered and enforced, and *for that purpose* this honorable court *retains jurisdiction* of any case that has once been decided by it, and in which it has given instructions that action be taken. Upon that theory we in our motion to dismiss ask this honorable court to examine the judgment and decree from which this appeal was taken, for the purpose of determining whether or not that which this court had ordered done has been properly done. Such a jurisdiction can extend only to such matters as this court had directly or indirectly before it and directly or indirectly decided or instructed what action be taken.

The questions decided by this court were, that the Silver

Bell Copper Company was the owner of each and every sum of money involved in the action; that Albert Seinfeld had no right or title to that money or its possession; that the appointment of a receiver was necessary to take charge of the Silver Bell Copper Company, that it be dissolved, and for attorneys' fees, etc. No question was raised in this court as to Albert Seinfeld's right to have credits for the sum of \$12,700 claimed to have been paid by him to Francis and Volkert, or for the sum of \$25,750 now claimed to be held by him in garnishment proceedings in the Franklin case. Those are new matters arising in the case after Arizona became a State.

The mandate of this honorable court was that the lower court take such action and further proceedings as were *not inconsistent* with the decision of this honorable court, and "such execution and further proceedings be had in said cause, in conformity with the opinion and judgment of this court as according to right and justice and the laws of the United States ought to be had," etc.

In addition to what we have heretofore said we add that no action taken by Judge Sutter in entering the judgment here complained of was *inconsistent* with the decision of this honorable court. This applies to every matter of which appellants complain. It applies not only to all the matters directly and indirectly involved in this honorable court's decision, but to the questions of attorneys' fees, costs, interest, the credit for payment to Francis and Volkert, and the \$25,750 covered by the Franklin garnishment. Not one of these matters as formulated and adjudged by Judge Sutter, was inconsistent with this honorable court's decision.

This court has and can have no jurisdiction of this case by appeal or writ of error under enabling act admitting Arizona to Statehood.

In their Reply Brief on Motion to Dismiss counsel for appellants argue that the enabling act under which Arizona became a State, gave and gives *this* honorable court jurisdiction to review by appeal the judgment entered in the case, in the Superior Court of Pima County, Arizona, after Arizona became a State.

Counsel quote from sections 32 and 33 of that act on pages 2, 3, and 4 of their brief on the motion to dismiss.

In the case of Northern Pac. R. R. Co. *vs.* Holmes, 155 U. S., 137, cited by us in our brief on this motion, and referred to by counsel on page 1 of their brief, this honorable court decided that only where the enabling acts, under which Territories were admitted to statehood, expressly gave or reserved jurisdiction to this court, did it have or retain jurisdiction of cases pending when the Territory became a State. In that case, as we read and interpret it, this court decided that it could and would not extend its jurisdiction of such cases beyond the literal grants of the act in question. This case, as has heretofore been stated, was pending in and undecided by this court when the Arizona Enabling Act was passed, and when Arizona became a State. The then jurisdiction of this honorable court over that case was only because it was from a Territory. This case plainly does not come within the provisions of section 33 of the act (Appellants' Reply Brief on Motion to Dismiss, pages 2 and 3), but within section 32 of that act (*id.*, pages 3 and 4). We submit that there is absolutely nothing in that section which gives to this honorable court any jurisdiction by appeal or writ of error over judgments entered by the courts of the State of Arizona in cases which were pending in this court at the time the Territory became a State, except jurisdiction, *in a proper proceeding, to see that its mandates are obeyed.*

We again, in all seriousness, affirm that this appeal is for delay.

We respectfully submit, that the appeal should be dismissed, the judgment of Judge Sutter affirmed, and that full penalties should be imposed against Albert Steinfeld for taking this appeal.

Respectfully submitted,

FRANK H. HEREFORD AND
EDWIN A. MESERVE,

*Attorneys for L. Zeckendorf,
Plaintiff and Appellee.*

Office Supreme Court, U. S.

FILED

OCT 19 1915

JAMES D. MAHER

CLERK

IN THE
SUPREME COURT OF THE UNITED STATES.
OCTOBER TERM, 1915.

No. 239.

ALBERT STEINFELD ET AL. (DEFENDANTS), PLAINTIFFS IN ERROR,

vs.

LOUIS ZECKENDORF (PLAINTIFF) AND HIRAM W. FENNER, RECEIVER (DEFENDANT), DEFENDANTS IN ERROR.

BRIEF OF HIRAM W. FENNER, RECEIVER, DEFENDANT IN ERROR.

EDWIN F. JONES,
SELIM M. FRANKLIN,

*Attorneys for Hiram W. Fenner, Receiver,
Defendant in Error.*



IN THE
SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1915.

No. 239.

ALBERT STEINFELD ET AL. (DEFENDANTS), PLAINTIFFS IN ERROR,

vs.

LOUIS ZECKENDORF (PLAINTIFF) AND HIRAM W. FENNER, RECEIVER (DEFENDANT), DEFENDANTS IN ERROR.

BRIEF OF HIRAM W. FENNER, RECEIVER, DEFENDANT IN ERROR.

Statement of the Case.

There is now pending before this court the appeal of Albert Steinfeld *et al.* in the above-numbered case, and upon this appeal Hiram W. Fenner, receiver, has already filed his brief. Since that brief was filed Albert Steinfeld *et al.* have sued out a writ of error, in which are assigned as error the same errors as were assigned upon the appeal, and in addition hereto another error not assigned upon the appeal, and this new assignment of error requires consideration. We there-

fore will ask that this present brief be read in connection with the brief on appeal heretofore filed by Hiram W. Fenner, receiver.

The error assigned by Albert Steinfeld *et al.* on their writ of error, and which was not assigned upon their appeal, is set forth under the head of the (third) III assignment in their petition for a writ of error, and involves the item of \$12,700 paid by Steinfeld to Francis and Volkert.

In the brief heretofore filed by Hiram W. Fenner, receiver, on the appeal we did not in any way consider the item of \$12,700 for the reason that Steinfeld *et al.* had not in any way referred to it in their assignment of errors.

Today our attention is called to the brief which counsel for Steinfeld have filed upon their appeal, a copy of which has not yet been served upon us, and we note that the failure of the lower court to allow Steinfeld this item is an error specified in their brief, although not assigned as an error in their petition for appeal.

Had the learned counsel for Steinfeld *et al.* furnished us with a copy of their brief so that we could have been apprised of the fact that alleged errors were to be considered and urged by them other than those contained in their assignment of errors as contained in the printed record, we would not have called attention to what is, to say the least, a very important irregularity, but would have considered this assignment also in our first brief.

FRANCIS AND VOLKERT ITEM—\$12,700.

The allegations in Zeckendorf's third amended complaint (being the complaint upon which the case was tried) as to this item are as follows:

"That upon the closing down of said mine and in
 "the spring of 1900 said Albert Steinfeld, as such
 "agent or representative of and for the benefit of the
 "said Neilsen Mining and Smelting Company, pur-
 "chased from said Francis and said Volkert their in-

"terest in said entire group of mines, paying them
 "therefor the sum of twenty-five hundred (\$2,500)
 "dollars, and entering into a further contract with
 "said parties to pay them the further sum of twelve
 "thousand five hundred dollars (\$12,500) out of the
 "proceeds of the sales of said mines, in the event the
 "same were sold, and which said sum of \$12,500 was
 "paid by said Steinfeld to said Francis and Volkert
 "out of the proceeds received from said Imperial
 "Copper Company for the sale of said mines described
 "in Schedule A hereto attached" (Tr., p. 248, fol.
 575).

To this allegation Steinfeld and the other defendants in
 their answer made the following denials:

"And defendants deny upon the closing down of
 "the said mine and in the spring of 1900 said Stein-
 "feld as agent or representative of or for the benefit
 "of the said Neilson Mining and Smelting Company
 "purchased from said Francis and Volkert their in-
 "terest in said group of mines, and allege that on or
 "about the 15th day of May, 1900, the said Steinfeld
 "purchased from the said Francis and Volkert their
 "interest in the said mines for the sum of \$15,000,
 "\$2,500 in cash and \$12,500 to be paid out of the
 "proceeds of the sales of the said mine, in the event
 "that the same were sold, and that he paid to the said
 "Francis and Volkert the said sum of \$2,500 out of
 "his own funds on or about the 15th day of May,
 "1900, and that he made the said purchase for his
 "own use and benefit and not otherwise." * * *

"And the defendants deny that the said sum of
 "\$12,500 or any part thereof was paid by said Stein-
 "feld to said Francis or Volkert out of the proceeds
 "or any thereof, received from said Imperial Copper
 "Company and allege that the said sum of \$12,500
 "was paid by the said Steinfeld out of his own per-
 "sonal funds on or about January 10th, 1904" (Tr.,
 pp. 277, 278, fols. 656, 657, 658).

Zeckendorf in his third amended complaint alleges that Steinfeld paid this sum of \$12,500 to Francis and Volkert *out of the funds of the corporation*. Steinfeld denies this in his answer and alleges that he paid this sum *out of his own funds*.

That Steinfeld paid Francis and Volkert the sum of \$12,500 is admitted, but was it his own money that he so paid? Steinfeld alleges it was. Zeckendorf alleges it was out of "the proceeds received from the Imperial Copper Company for the sale of said mines."

Here was a clear-cut issue of fact, and upon this issue the Supreme Court of the Territory of Arizona in its statement of facts in the nature of a special verdict made no finding whatsoever.

The only finding which the Supreme Court of the Territory made was the finding which is quoted on page 42 of Steinfeld's brief, namely:

" * * * That on the 9th day of January, 1904, "said Albert Steinfeld paid to Francis and Volkert "the sum of \$12,700" (Finding XXXIV, Tr., p. 407).

This fact was not disputed in the pleadings. But the Supreme Court of the Territory did not find or determine whose money it was that Steinfeld so paid; whether it was out of the moneys of the Neilson Mining and Smelting Company (whose name subsequently was changed to Silver Bell Copper Company) as alleged by Zeckendorf, or whether it was out of Steinfeld's own individual funds, as alleged by Steinfeld. *The issue made by the pleadings, as to whose money it was that Steinfeld so paid out, was not determined by the Supreme Court of the Territory in its findings of fact.*

In the absence of any finding on this point, the question being still undetermined whether it was Steinfeld's individual money or the money of the corporation which Steinfeld paid out to Francis and Volkert, the lower court could

not, without a further hearing on this undecided issue of fact, decree that Steinfeld was entitled to a credit for this sum.

And the lower court in its decree did give Steinfeld full opportunity, by supplemental proceedings, to present his claim for this sum with any proof he might have, further providing that if just it, as well as any and all other just claims which Steinfeld might have, would be allowed by the court and ordered paid by the receiver. The provision of the decree on this point is as follows:

"Eleventh. That the said Hiram W. Fenner as receiver, out of the moneys which may be paid to him by the said Albert Steinfeld, and which shall be recovered from Steinfeld in this action, shall pay to the said Albert Steinfeld all sums of money heretofore necessarily paid by the said Steinfeld for and on account of the said Silver Bell Copper Company, after an account of the same has been presented, audited, and approved by this court" (Tr., p. 100, fol. 234).

Counsel for Steinfeld in their brief quote a finding of fact made by the district court upon the *first* trial, which finding was not adopted by the Supreme Court of the Territory—a repudiated and discarded finding of fact—to the effect that Steinfeld was entitled to a credit for the sum of \$12,700 and certain other sums (Appellants' Brief, p. 42).

But it is manifest and clear that the lower court in entering a decree under the mandate of this court could only consider the facts as found by the Supreme Court of the Territory, and that it could not consider facts which theretofore had been found by the district court and which had not been adopted by the Supreme Court of the Territory, but which in effect had been repudiated. Such findings are no part of the record in this case and we marvel why counsel refer to them in their brief.

Steinfeld, instead of filing his account with the lower

court of such sums and amounts as he had expended for or on account of the Silver Bell Copper Company, immediately appealed from the very decree which gave him this right. He has filed no account, no claim, but, asserting that he was wronged because the lower court did not allow him a credit for this sum of \$12,500 and interest, as to which item there is no finding of fact which warrants its allowance, he has sued out this appeal and a writ of error. Until an accounting is had the decree as to this item is not final and not yet appealable. But Steinfeld appeals from that portion of the decree which is for his own benefit and which protects any rights he may have, although no accounting has yet been had; and in so appealing he delays the execution of the judgment of this court and of the lower court entered under the mandate of this court, which requires him to pay back to the Silver Bell Copper Company or its receiver the vast sums of money which this court already has decided he unlawfully appropriated. We submit there is no merit in this assignment of error.

FRANKLIN GARNISHMENT, \$25,750 PRINCIPAL, \$14,613.11
INTEREST.

The argument of Fenner, receiver, as to this item is set forth in the brief for Hiram W. Fenner, receiver, appellee, heretofore filed, on pages 17 to 32 thereof, under the heading of "Appellants' Assignment of Error V."

We considered that the "Assignments of Error" which appellants filed with their petition upon appeal and as printed on pages 195 to 206 of the transcript were the assignments to be presented in this case. We are now confronted with a different "Assignments of Error" in appellants' brief, different as to number and different as to errors assigned, and not having been served with a copy of appellants' brief we have followed, in our brief on appeal, the

number and matter of each error assigned as set forth in the printed transcript of the record.

We respectfully ask that our brief on the appeal be also considered in connection with the present brief, upon the writ of error, as though incorporated herein.

Respectfully submitted,

EDWIN F. JONES,
SELIM M. FRANKLIN,

*Attorneys for Hiram W. Fenner, Receiver,
Defendant in Error.*

12
Office Supreme Court, U. S.

FILED

OCT 12 1915

JAMES D. MAHER

CLERK

Supreme Court of the United States.

OCTOBER TERM, 1915.

No. 239.

ALBERT STEINFELD, R. K. SHELTON, J. N. CURTIS,
SILVER BELL COPPER COMPANY and
MAMMOTH COPPER COMPANY,

Appellants,

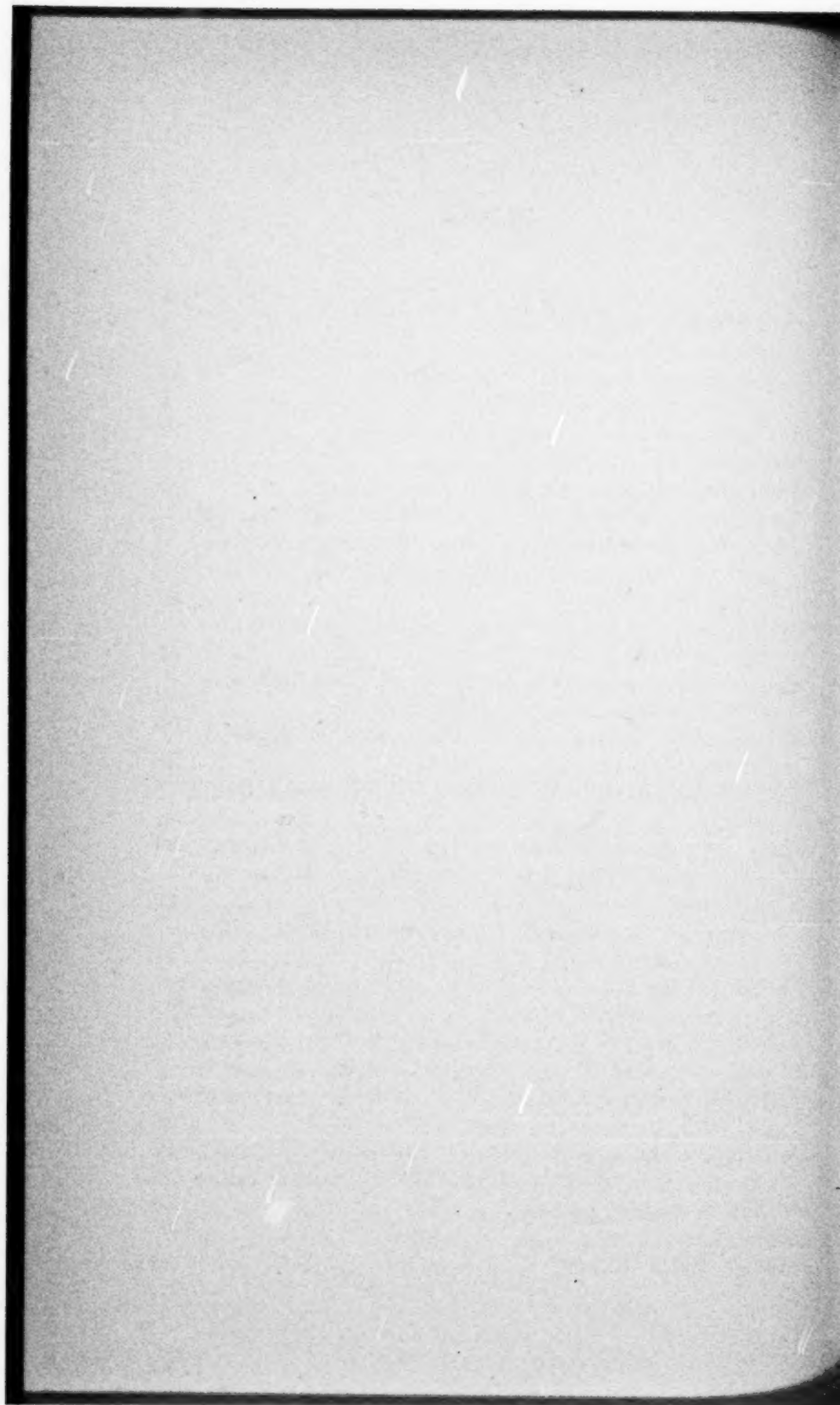
vs.

LOUIS ZECKENDORF and HIRAM W. FENNER, Receivers.

BRIEF OF APPELLANTS.

JAMES M. BECK,
FRANCIS J. HENEY,
EUGENE S. IVES,

Attorneys for Appellants.



INDEX.

	PAGE
Points and authorities.....	I
Statement of the case.....	1
Stockholders' resolution of rescission (p.).....	6
Contract of May 20, 1903 (p.).....	8
Proceedings in case.....	10
Issues as made by pleadings.....	11
Proceedings in case (Continued).....	12
Injustice to deprive Steinfeld of right to have issue of fact as to intent tried by <i>nisi prius</i> court, merely because territorial Supreme Court adopted wrong theory of law on first appeal thereto.....	20
Interpretation of mandate by the Superior Court of the State of Arizona.....	21
Proper interpretation of mandate and of the opinion and decision of this Court on the former appeal.....	23
Interpretation of mandate of this Court by Supreme Court of Arizona.....	26
Proper interpretation of mandate of this Court (Con- tinued).....	31
Errors in judgment as entered by State Court of Arizona.....	39
Francis & Volkert item of \$19,901.75, including in- terest	40
Franklin garnishment item of \$40,363.11, including interest	44
Additional attorneys' fees of 10%, or \$6,026.48 on aggre- gate sum of \$60,264.86, made up of Francis & Volkert item of \$12,700 principal with \$7,201.75 interest or a total of \$19,901.75, and Franklin garnishment item of \$25,750 principal with \$14,613.11 interest, or a total of \$40,363.11	57
Additional attorneys' fees, \$40,125.13.....	61
Compound interest on judgment in second cause of action.....	71
Motion to dismiss Receiver.....	72
Appendix.....	
Assignment of Errors.....	VII

Table of Cases.

	PAGE
Ball vs. Rankin, 101 Pac., 1105 (Oklahoma).....	21
Barnes, <i>et al.</i> , vs. Williams, 11 Wheat., 414.....	37
Board of Supervisors vs. Kennicott, 94 U. S., 449.....	23
Burr vs. Des Moines Co., 68 U. S., 99.....	28
Dower vs. Richards, 151 U. S., 659.....	27
E. A. Packer, The, 140 U. S., 360.....	IV
Eagle Mining Co. vs. Hamilton, 218 U. S., 513.....	24
Edmonston vs. McLoud, 16 N. Y., 543.....	21
Elliott's Appellate Procedure, Sec. 580.....	V
<i>Ex parte</i> Medway, 90 U. S., 504.....	30
Faulkner vs. Healy, 107 Cal., 49.....	VI
French vs. Edwards, 21 Wall., 147.....	28
French vs. Edwards, 91 U. S., 423.....	28, 30, 31
Griffin vs. Marquardt, 17 N. Y., 28.....	21
Hecht vs. Boughton, 105 U. S., 235.....	25
Himely vs. Rose, 5 Cranch., 312.....	60
Idaho & Oregon Land Co. vs. Bradford, 132 U. S., 513....	24
<i>In re</i> Washington & G. R. Co., 140 U. S., 92.....	60
Lehnen vs. Dickson, 148 U. S., 71.....	IV
Lincoln vs. French, 105 U. S., 614.....	28, 32
McMannomy vs. Chicago, D. & V. R. Co., 47 N. E., 713 (Illinois).....	37, 70
Powers vs. United States, 119 Fed. Rep., 563 (C. C. A., Sixth Circuit).....	IV
Prentice vs. Crane, 88 N. E., 655 (Ill.).....	VI
Raimond vs. Terrebonne Parish, 132 U. S., 192.....	IV
Ryan vs. Tomlinson, 39 Cal., 639.....	VI
Stearns vs. Aguirre, 7 Cal., 443.....	VI
Sun Mutual Insurance Co. vs. The Ocean Insurance Co., 107 U. S., 485.....	17, 32
Talcott vs. Delta County Land & Cattle Co., 73 Pac., 256 (Colorado).....	V
Wilson vs. Merchants Loan & Trust Co., 183 U. S., 121....	34
Zeckendorf vs. Steinfeld, 225 U. S., 445.....	19

POINTS AND AUTHORITIES.

I.

The jurisdiction of this court on the former appeal was limited to the single question of law, do the findings of fact support the judgment? And consequently that was the *subject matter* of the proceeding here.

Zeckendorf vs. Steinfeld, 225 U. S., 445.

Eagle Mining Co. vs. Hamilton, 218 U. S., 513.

Idaho & Oregon Land Co. vs. Bradford, 132 U. S., 513.

II.

This court in the exercise of *such* appellate jurisdiction cannot and will not supply, *by intendment or inference*, any missing material fact, even if there were sufficient evidence or sufficient probative facts in the findings, from which the lower court might have inferred such missing material fact. To do so would be to usurp the functions of the *trial* court, whose indispensable duty it is to make that inference of fact for itself. This well-settled principle of law applies in all classes of cases in which the appellate jurisdiction of this court is limited by regulatory acts of Congress to questions of *law only*. No distinction is made on account of the nature or character of the case or of the method by which it was tried in the court of original jurisdiction, or of the name applied to the procedure by which it reached this court for review. The rule applies alike to appeals from federal courts in admiralty cases; to writs of error to federal courts in common law actions, whether tried with or without a jury; and to appeals from the Court of Claims; and to writs of error to the highest appellate court of a State; as well as

IV

to both appeals from and writs of error to territorial Supreme Courts.

Sun Mutual Insurance Co. vs. The Ocean Insurance Co., 107 U. S., 485.

Burr vs. Des Moines Co., 68 U. S., 99.

Hecht vs. Boughton, 105 U. S., 235.

Lincoln vs. French, 105 U. S., 614.

Construing effect of:

French vs. Edwards, 21 Wall, 147. And,

French vs. Edwards, 91 U. S., 423.

Ex-parte Medway, 90 U. S., 504.

Dower vs. Richards, 151 U. S., 659.

Wilson vs. Merchants' Loan & Trust Co., 183 U. S., 121.

Raimond vs. Terrebonne Parish, 132 U. S., 192.

Lehnen vs. Dickson, 148 U. S., 71.

Barnes, *et al.* vs. Williams, 11 Wheat., 414.

Powers vs. United States, 119 Fed. Rep., 563 (C. C. A., Sixth Circuit).

The E. A. Packer, 140 U. S., 360.

Eagle Mining Co. vs. Hamilton, 218 U. S., 513.

Idaho & Oregon Land Co. vs. Bradford, 132 U. S., 513.

The case of French vs. Edwards, 21 Wall., 147 (as construed by this court in the case of French vs. Edwards, 91 U. S., 423), and the case of *Ex-parte* Medway, 90 U. S., 504, are on all fours with the case at bar.

III.

The mandates of this court are to be interpreted according to the *subject matter* of the proceeding here, and, if possible, so as not to cause injustice.

Board of Supervisors vs. Kennicott, 94 U. S., 449.

IV.

The vital question in this action under the pleadings is whether Zeckendorf and Steinfeld made a mutual "mistake" of fact in voting at the stockholders' meeting in favor of the resolution to rescind the contract of May 20, 1903, *in toto*, and whether their minds *as a question of fact* ever met in any agreement to rescind such contract, wholly or in part. No finding of fact was made by the territorial District Court on these issues, *because the territorial Supreme Court adopted a wrong theory of law in relation thereto* on the first appeal to that court, by holding that if any "mistake" was made by Zeckendorf or Steinfeld in the matter, it was one of law and not of fact and could not be relieved against. Consequently Steinfeld has never had his day in Court on these questions of fact.

Whenever a trial court fails to find any material fact by reason of a wrong theory of the case adopted either by itself or an intermediate appellate court, the court of last resort, if it reverses the judgment, should direct or at least authorize a new trial to prevent injustice to appellee or defendant in error.

Edmonston vs. McLoud, 16 N. Y., 543.

Griffin vs. Marquardt, 17 N. Y., 28.

Ball vs. Rankin, 101 Pac., 1105 (Oklahoma).

V.

When an appellate court, on "the evidence as it is presented in the record," or on findings of fact which are conclusive upon it reverses, generally, the judgment of the lower Court, an appellee or defendant in error is entitled as a matter of right to a *retrial* of the case, and the mandate of this Court should be interpreted accordingly.

Lincoln vs. French, 105 U. S., 614.

Elliott's Appellate Procedure, Sec. 580.

Talcott vs. Delta County Land & Cattle Co., 73 Pac., 256 (Colorado).

Faulkner vs. Healy, 107 Cal., 49.
 Stearns vs. Aguirre, 7 Cal., 443.
 Prentice vs. Crane, 88 N. E., 655 (Illinois).
 Ryan vs. Tomlinson, 39 Cal., 639.

VI.

Should the Court however conclude that its opinion and decision on the former appeal must be interpreted as in effect an instruction to the trial court to, enter judgment against Steinfeld on the first cause of action, then, nevertheless, that judgment is erroneous, and is too large to the full amount of the following particulars :

Amount paid to Francis and Volkert.	\$12,700.00	
Interest thereon.....	7,201.75	\$19,901.75
<hr/>		
Franklin Garnishment	25,750.00	
Interest thereon.....	14,613.11	40,363.11
<hr/>		
		\$60,264.86
10 per cent. for attorney's fees on all the fore- going items.....		6,026.48
Other additional attorney's fees		33,098.65
Compound interest on second cause of action...		1,670.00
<hr/>		
Total		\$101,059.99

In re Washington & G. R. Co., 140 U. S., 93.
 Himely vs. Rose, 5 Cranch., 312.
 McMannomy vs. Chicago D. & V. R. Co., 47 N. E.,
 713 (Illinois).

ASSIGNMENT OF ERRORS.

I.

The Supreme Court of Arizona erred in dismissing the appeal of the defendants-appellants from the judgment of the Superior Court of the State of Arizona in and for Pima County, for the reason that the judgment of the Superior Court was appealable to the Supreme Court of the State of Arizona, and that said appeal was properly taken, and the Supreme Court of Arizona had jurisdiction over the subject matter and of the persons of all of the parties to the said action, and it was its duty to hear and determine the said appeal upon its merits.

II.

The Supreme Court of the State of Arizona erred in dismissing the said appeal of the defendants-appellants for the reason that the Superior Court of the County of Pima, State of Arizona, erred in interpreting the mandate, opinion and decision of this court as being in effect an instruction to enter judgment in favor of Zeckendorf on the first cause of action, for the reason that said mandate, opinion and decision should properly be interpreted as authorizing the said Superior Court to determine for itself, in the exercise of sound judicial discretion, and in accordance and consistent with the principles of law enunciated by this court in its decision on the former appeal, what further proceedings, if any, ought to be taken in said action which would be in accordance with law and justice.

III.

The Supreme Court of the State of Arizona erred in dismissing the appeal of the defendants-appellants from the judgment of the Superior Court, for the reason that even if the mandate, opinion and decision of this court ought properly to be interpreted as being in effect an instruction to the state courts of Arizona to enter judgment in favor of Zeckendorf on the first cause of action, then nevertheless such judg-

VIII

ment is erroneous, because it is unwarranted and excessive to the full extent of the following particulars, to wit:

Amount paid to Francis and Volkert..	\$12,700.00	
Interest thereon.....	7,201.75	\$19,901.75
Franklin garnishment.....	\$25,750.00	
Interest thereon.....	14,613.11	\$40,363.11
		<hr/>
		\$60,264.86
Ten per cent. for attorney's fees on all the fore- going items.....		6,026.48
Other Additional Attorney's Fees.....		33,098.65
Compound interest on second cause of action...		1,670.00
		<hr/>
Total		\$101,059.99

IV.

The Supreme Court of the State of Arizona erred in dismissing the appeal of defendants-appellants from the judgment of the Superior Court, for the reason that error was committed by the Superior Court in changing the judgment of the District Court of the Territory of Arizona in relation to the second cause of action, so as to allow \$1,670 additional interest.

V.

The Supreme Court of the State of Arizona erred in dismissing the said appeal of the defendants-appellants from said judgment of the Superior Court, for the reason that said Superior Court committed error in refusing to discharge the receiver upon the showing made that the Silver Bell Copper Company is no longer a going concern and its dissolution has been decreed; that it has no debts; that it has no creditors other than Steinfeld; that Zeckendorf and Steinfeld are its sole stockholders, and that consequently justice may best be done in this case, at least expense, by treating that corporation as a mere agency and requiring Steinfeld to pay directly to Zeckendorf the latter's share of any money that the judgment would otherwise require Steinfeld to pay to the Silver Bell Copper Company.

Supreme Court of the United States,

(OCTOBER TERM—1915). CASE No. 239.

ALBERT STEINFELD, R. K. SHELTON,
J. N. CURTIS, SILVER BELL COPPER
Co. and MAMMOTH COPPER Co.,
Appellants,

VS.

LOUIS ZECKENDORF and HIRAM W.
FENNER, Receiver,
Appellee.

**APPEAL FROM THE SUPREME COURT OF
THE STATE OF ARIZONA (under terms of
the Arizona Enabling Act, 36 Stat., 557, ch.
310, Sec. 33, p. 577).**

Statement of the Case.

This case is now on appeal here for the second time. The first appeal was perfected during the time that Arizona was a territory. It is a stockholders' suit by Louis Zeckendorf, on behalf of the Silver Bell Copper Company, to recover from Albert Steinfeld certain money which it is alleged belongs to the Silver Bell Copper Company, and was wrongfully converted by him to his own use and benefit.

The complaint sets forth two causes of action, and the judgment of the trial court upon the second cause of action in favor of Zeckendorf was affirmed by the Supreme Court of the Territory of Arizona and subsequently

by this Court, and it has of course become final and has in fact been paid in full by Albert Steinfeld, except as to an inconsiderable amount (\$1,670) for compound interest which was added by the Superior Court of the State of Arizona when it entered a new judgment thereon.

The first cause of action involves the right to the proceeds of the sale of certain mines known as the "English" group.

The facts of the case, in so far as it is necessary to state them in order to explain the nature of the first cause of action, and as they appeared in the statement of the case in the nature of a special verdict which was certified to this Court by the Supreme Court of the Territory of Arizona on the former appeal, are as follows :

Louis Zeckendorf is the uncle of Albert Steinfeld. During the times hereinafter mentioned, and continuously since 1878, Zeckendorf and Steinfeld were engaged in the mercantile business in the City of Tucson, Territory of Arizona, under the firm name of L. Zeckendorf & Co. Steinfeld was the resident managing partner, and personally arranged its banking credit on the Pacific Coast, and particularly at the Bank of California, in San Francisco. Zeckendorf was a resident of the City and State of New York.

Under Steinfeld's management the mercantile business became a large and prosperous one.

In January, 1899, the Silver Bell Copper Company (originally under the name of Nielsen Mining and Smelting Company) was organized by the firm of L. Zeckendorf & Co. for the purpose of taking over the title to a group of mining claims known as the "Old Boot" group in which it had acquired a half interest in payment of an old debt.

The mines were operated by the company at a loss, so that in May, 1903, it owed the firm of L. Zeckendorf & Co. the sum of \$114,382, which included interest at ten per cent. per annum on all advances and sales of merchandise from the respective dates when made, and also included \$25,000 originally paid for the "Old Boot" group of mines, together with interest thereon at the same rate, from the respective dates of payment.

In June, 1900, a stockholder, one Nielsen sold his 300 shares of stock to Steinfeld and the Silver Bell Copper Company jointly and Steinfeld paid him therefor the sum of \$2,000 in cash out of his personal funds. As a further considera-

tion, Steinfeld and the Silver Bell Copper Company jointly agreed to pay Nielsen the additional sum of \$10,000 out of the profits of the mines, if any, and otherwise out of the proceeds of a sale of the mines, if one should be effected.

Adjacent and contiguous to and surrounding the "Old Boot" group of mines were some additional mining claims which were known as the "English" group. The title to them was in an English company. Prior to 1901 they had been relocated by two parties, Francis and Volkert, under the claim that the assessment work had not been done upon the property by the English company. The latter company continued to assert its title to the group, however, upon the theory that because Francis and Volkert were its employees at the time of the relocations, they would enure to its benefit.

Prior to May, 1900, it looked probable that the ledge of ore which constituted the main value of the "Old Boot" group, extended through one of the end lines of that group into some of the so-called "English" group. Steinfeld wrote Zeckendorf on several occasions, urging the importance of acquiring the title to the "English" group. Zeckendorf ignored these suggestions, and in his reply to those letters Zeckendorf upbraided Steinfeld for getting the firm of L. Zeckendorf & Co. so heavily involved in the "Old Boot" group.

By May, 1900, the indebtedness of the Silver Bell Copper Company to L. Zeckendorf & Co. had increased to about \$75,000, and Steinfeld became greatly alarmed and anxious, and concluded that he would personally purchase the "English" group as a matter of protection to himself. Accordingly, in May, 1900, he purchased the jumpers' title of Francis and Volkert, and paid them out of his own funds the sum of \$2,500 in cash, and entered into a written agreement to pay them the additional sum of \$12,500 out of the proceeds of the sale of the mines, if one should be effected, and to promptly purchase the title of the English company to those mines for purposes of such resale.

Thereupon Steinfeld, after first advising Zeckendorf of his intention so to do, went to Europe, and did purchase the title of the English company, at an expense of about \$8,000, which he paid out of his own funds, and upon his return to New York he informed Zeckendorf that he had acquired them.

About the month of June, 1901, Mr. S. M. Franklin, who

was the regular attorney for both L. Zeckendorf & Co. and the Silver Bell Copper Company, and was at the same time the legal adviser of Steinfeld personally, advised Steinfeld that he could not hold the ownership of the "English" group in his own right, but that he was by law a trustee for the Silver Bell Copper Company, and that the only way in which he could relieve himself from this legal liability was to give an option to the Silver Bell Copper Company to purchase his title to the "English" group, at exactly what it had cost him. Steinfeld stated that he did not aim to make any profit out of the transaction, and that he would gladly give such an option, and accordingly the same was prepared and given. This option appears in the transcript at pages 311 to 315 inclusive. In effect, Steinfeld offered to convey to the Silver Bell Copper Company all his interest in the "English" group of mines, provided that corporation should repay him the amount he had expended in acquiring the same, with interest thereon, and should assume all obligations which he had personally assumed. This option expired October 15th, 1901, but was renewed from time to time.

The mines continued to be operated at a loss, thereby increasing the indebtedness to L. Zeckendorf & Co., and increasing the anxiety of Steinfeld, but the ores taken from the "English" group more than paid for the development work done upon them.

Steinfeld continued to exert himself to make a sale of the joint groups of mines until May, 1903, when he succeeded in selling them to the Imperial Copper Company for the sum of \$515,000, payable as follows: \$115,000 in cash, and four promissory notes for \$100,000 each, payable respectively 3, 6, 9, and 12 months from date. At the time this sale was being consummated the option which Steinfeld had given to the Silver Bell Copper Company upon the "English" group had expired, but before concluding the sale Steinfeld generously renewed to the Silver Bell Copper Company his offer of July 15th, 1901, with certain modifications, and thereby offered to allow the entire purchase price for the joint group of mines to be paid to the Silver Bell Copper Company provided that corporation would repay to him all that he had expended in acquiring title to the "English"

group, with interest thereon, and would assume all the obligations which he had personally incurred in acquiring his title to the "English" group, and would also protect and secure him against all liability which he might incur by reason of his personal guarantee of the title to the property thus sold.

At a meeting of the Board of Directors of the Silver Bell Copper Company, held on the 20th day of May, 1903, Curtis, as President of the corporation, read a report reciting that Steinfeld had made such an offer, and that Steinfeld stipulated as a part of the offer that the four \$100,000 notes of the Imperial Copper Company should remain in his custody as trustee for the Silver Bell Copper Company to secure him against liability on his guarantee of the title. This offer the Company by formal resolutions of the Board accepted.

As a result of this action, a formal contract dated May 20, 1903, was executed, by which it was agreed that the entire purchase price of the two groups of mines should be paid and delivered to the Silver Bell Copper Company as soon as Steinfeld was fully protected on his guarantee. We shall presently set forth that contract in full, in connection with a certain stockholders' resolution purporting to rescind the same.

Shortly after the sale of the mines had been consummated, Mr. S. M. Franklin brought suit against the Silver Bell Copper Company, claiming that he should receive 10 per cent. of the total sale price of the mines, or to wit, the sum of \$51,500, as his fee for acting as the attorney for that corporation. Franklin caused a writ of garnishment to be served upon Steinfeld in that suit, and at the time of its service Steinfeld had in his hands more than \$51,500 in cash which belonged to the Silver Bell Copper Company.

The first payment upon the mines was \$115,000 in cash, and the day after the sale Steinfeld applied \$74,383 of that amount on the account of I. Zeckendorf & Co. with the Silver Bell Copper Company. He also paid \$22,500 to N. O. Murphy as an agreed commission for the sale of the mines, and then paid to himself, under the contract of May 20th, 1903, the sum of \$18,117. These payments make up the total of \$115,000.

The first note of the Imperial Copper Company was paid on August 23rd, 1903, and amounted with interest to \$101,500. On the same day Steinfeld paid to L. Zeckendorf & Co. upon its account the further sum of \$35,000, and on September 4th,

1903, he paid to L. Zeckendorf & Co. the balance of its account, amounting to \$5,000.

The total thus paid to L. Zeckendorf & Co. was \$114,382, and this included all expenditures, expenses and sales of merchandise incurred or made by it in connection with both groups of mines, with interest thereon at the rate of ten per cent. per annum from the respective dates at which they were incurred or made.

Steinfeld promptly advised Zeckendorf by letters in regard to all of these transactions and details, except that he did not send him a copy of the contract of May 20th, 1903, although he advised him fully as to the substance and effect thereof.

Zeckendorf protested to Steinfeld against that part of the contract which enabled Steinfeld to retain the proceeds of the sale as a temporary indemnity. Early in December, 1903, Zeckendorf and Steinfeld met in San Francisco, California, and the controversy between them on the subject was renewed, and about December 10th, 1903, Zeckendorf commenced a stockholders' suit on behalf of the Silver Bell Copper Company in the Superior Court of California against the Directors of the Company, to declare void the aforesaid contract of May 20th, 1903, upon the ground that it was fraudulently obtained from the corporation by Steinfeld, in that he controlled the Board of Directors at the time and was in effect dealing with himself.

In the complaint which Zeckendorf filed in the Superior Court of California he alleged, among other things, that at a meeting of the directors of the Silver Bell Copper Company which was held on May 20th, 1903, the following resolutions were passed :

" Resolved, that the President and Secretary of this corporation be and they hereby are authorized, empowered and directed, in such manner and form as they deem necessary or proper, to indemnify said Steinfeld against all loss, damage and expense that may arise to him by reason of his having guaranteed the title to the property so sold, or agreed to be sold to the said Imperial Copper Company ; and that he and they hereby are authorized, empowered and directed to do or cause to be done all things and

to execute all papers, documents, or other writings which they deem necessary in the premises.

" *Resolved*, that the agreement this day made by the President and Secretary of this corporation with the Mammoth Copper Company and Albert Steinfeld in regard to the disposition of the proceeds of the sale this day made to the Imperial Copper Company, and indemnifying said Steinfeld, be and the same is hereby ratified, approved and confirmed."

In the same complaint Zeckendorf prayed :

" That said Steinfeld be required to set forth the nature of his claim to said moneys and said notes, and the terms of the *agreement* referred to in said resolutions, and to account to said Silver Bell Copper Company for moneys received or that may hereafter be received by him, belonging to said corporation."

And lastly, he prayed :

" That said resolutions *and the agreements* therein referred to be declared null and void."

On December 26, 1903, a meeting of the stockholders of the Silver Bell Copper Company occurred in the office of Eugene S. Ives at Tucson, Arizona. Zeckendorf attended the meeting, accompanied by his attorney, Judge William H. Barnes. Steinfeld, Curtis and Shelton were present, and Ives was there as the attorney for Steinfeld. At that stockholders' meeting, at the suggestion of Ives, Shelton as a stockholder offered the following resolution :

" *Resolved*, that the agreement executed on May 20th, 1903, by the president and secretary of the corporation, the Mammoth Copper Company, and Albert Steinfeld (a copy of which is hereto attached), be and the same is hereby rescinded, and that the said agreement and resolution passed on said day be declared null and void."

The words in brackets, "a copy of which is hereto attached", were not in the resolution as originally offered, but at the suggestion of Judge Barnes, speaking for Zeckendorf, it was amended by inserting them and by actually attaching a copy of the contract mentioned therein. The resolution was adopted by a unanimous vote.—Zeckendorf voted his 250 shares in favor of it and Steinfeld voted all shares standing in his name in favor of it.

The contract of May 20, 1903, which was attached to the resolution, reads as follows :

" This agreement made this 20th day of May, 1903, between the Silver Bell Copper Company, a corporation organized and existing under the laws of the Territory of Arizona, party of the first part, and the Mammoth Copper Company, a corporation organized and existing under the laws of the Territory of Arizona, party of the second part, and Albert Steinfeld, of Tucson, party of the third part, witnesseth :

" WHEREAS, the parties hereto have this day agreed to sell certain mining claims and property to the Imperial Copper Company, a corporation, as per written agreements heretofore made, and deeds for which property are now in escrow with the Phoenix National Bank of Phoenix, Ariz. ; and

" WHEREAS, *the parties hereto desire to settle and determine as between themselves what disposition shall be made of the proceeds of said sale ; and*

" WHEREAS, the said Albert Steinfeld has assumed certain obligations with the said Imperial Copper Company, as more fully appears in the various agreements heretofore entered into by him in making such sale, and particularly in a certain guarantee agreement, wherein, amongst other things, said Steinfeld guaranteed the title to certain mining claims so sold or agreed to be sold, and the parties of the first and second part desire to indemnify him against loss by reason of any of the said matters or things so done by him.

" Now, therefore, in consideration of the premises, and of the sum of one dollar (\$1.00) by each of the parties hereto to the other in hand paid, receipt whereof

is hereby acknowledged, *it is hereby mutually agreed that the purchase price paid and to be paid upon the sale, shall belong to and be the property of the said Silver Bell Copper Company.*

" And it is further agreed that the four promissory notes of one hundred thousand dollars (\$100,000.00) each, this day executed by the Imperial Copper Company to the Silver Bell Copper Company, upon said sale, as well as the proceeds of said promissory notes when collected, shall be held by the said Albert Steinfeld as trustee, and as security for, and indemnify against loss, damage or expense which may arise to him for, out, of, or by reason of any and all obligations and liabilities which he has assumed with the said Imperial Copper Company or any other person whatsoever.

And it is further agreed that no dividend shall be declared by the said Silver Bell Copper Company until the stockholders of said company shall first have fully indemnified said Albert Steinfeld against loss which might arise to him in the future, from or on account of any such obligations or liabilities so assumed by him.

In witness whereof, the said corporations, parties of the first and second part, has caused these presents to be signed by its president and secretary, and its corporate seal to be hereunto affixed by resolution of its Board of Directors, and the said Albert Steinfeld has hereunto placed his hand and seal the day and year first above written."

Following the stockholders' meeting the Board of Directors held a meeting and passed the necessary resolution authorizing such rescission. Steinfeld was present but did not vote. This resolution authorized the president and secretary of the Silver Bell Copper Company to execute a formal and full rescission of the contract of May 20, 1903.

Immediately thereafter, a draft for \$18,000 on L. Zecken-dorf & Co., bankers, and a check for \$117 was delivered by Steinfeld to Curtis as the treasurer of the Silver Bell Copper Company, and an agreement in writing was duly executed by the Silver Bell Copper Company and Steinfeld, which rescinded

in toto the agreement of May 20, 1903. As soon as it was executed, this rescission contract was delivered to Steinfeld.

On January 9th, 1914, Steinfeld paid to Francis and Volkert \$12,700—out of his own funds in liquidation of the balances due them May 20/08 (with \$200 interest) for their jumpers title to the English group.

On the 16th day of January, 1904, the Silver Bell Copper Company, through Curtis and Shelton, acting as a majority of its Board of Directors, entered into a contract with Steinfeld under which it was stipulated and agreed that the net proceeds of the sale of the two groups of mines should be divided equally between Steinfeld, as the owner of the "English" group, and the Silver Bell Copper Company as the owner of the "Old Boot" group; and thereupon Curtis, as the treasurer of the Silver Bell Copper Company, delivered to Steinfeld the sum of \$145,743.75 in cash and one of the two remaining unpaid promissory notes of the Imperial Copper Company in the sum of \$100,000.

Proceedings in Case.

On January 27, 1904, Louis Zeckendorf filed a stockholders' suit on behalf of the Silver Bell Copper Company against Steinfeld, Curtis and Shelton, the directors of the Company, in the District Court of Arizona, for the purpose of compelling Steinfeld to make restitution to the Silver Bell Copper Company of the cash and note so delivered to him by Curtis on January 16, 1904.

The case finally went to trial on May 16, 1905, upon a third amended complaint, a jury trial having been waived by both sides. Essentially, it was a suit to reform a written contract of rescission on the ground of a mutual mistake of fact by the parties as to its actual contents, and for the recovery of notes and money amounting in the aggregate to \$209,126.75 alleged to have been converted by Steinfeld to his own use and for the recovery of a dividend on 300 shares of stock amounting to \$33,300 more, thus making a grand total of \$242,426.75. Zeckendorf's share of this was $\frac{2}{3}$ or \$86,580.97.

The District Court rendered judgment in favor of Zeckendorf upon both causes of action, in the total

sum of \$266,450.15, including interest to date of judgment, and "out of the said money recovered and to be recovered by said Silver Bell Copper Company from the said Albert Steinfeld," it was adjudged that the Silver Bell Copper Company should pay to Zeckendorf, as and for attorney's fees for the bringing of his action and the prosecution of the same up to and including the entry of judgment, the sum of \$15,000. It was further adjudged that Albert Steinfeld held the sum of \$25,750 in money belonging to said Silver Bell Copper Company in his hands as and for security to him against any liability on account of the garnishment levied on him in the action of Franklin vs. Silver Bell Copper Company, and that Steinfeld should account to that corporation or to the receiver appointed in this case, and should pay to the Silver Bell Copper Company or to the receiver any balance of said sum that might be left remaining after deducting therefrom such sums, if any, that Steinfeld might pay or have paid to Franklin on account of said garnishment, in the event that Franklin should recover in that action.

Each of the parties thereto appealed from this judgment to the Supreme Court of the Territory.

Issues as Made by Pleadings.

The third amended complaint alleged in substance that if the effect of the resolution of rescission, which was adopted by the stockholders on December 26, 1903, was to rescind the contract of May 20, 1903, *in toto*, then and in that event said resolution of rescission failed to express the true intent and meaning of the parties, and its adoption was the result of a mutual mistake on the part of Steinfeld and Zeckendorf, respectively, and that their real intention was to rescind and modify the contract of May 20, 1903, only in so far as it authorized Steinfeld to have the personal custody as trustee of the notes and money of the Silver Bell Copper Company, which were the proceeds of the sale of the mines, as security to protect him against any liability he might incur on his guarantee of the titles to the mines.

"The answer of the defendants denied that any mistake was made in this respect by any of the parties, and alleged

that it was the intention of all the parties thereto to rescind the contract of May 20th, 1903, *in toto*.

This question as to the true *intent* of the parties in voting for the resolution of rescission at the stockholders' meeting was the gist of the action. The resolution itself is expressed in terms which are clear and unambiguous. If that resolution, standing alone, is the exclusive evidence which can be considered in determining the intent of the parties at the stockholders' meeting, it necessarily follows that Steinfeld must prevail in this action in so far as that issue is concerned; but it is, and always was, conceded by defendants that it is not the exclusive evidence, and that their *intent* in voting for the resolution of rescission is a material question of fact to be determined in the light of all the facts and circumstances surrounding them and from all testimony that may be adduced on the subject.

Proceedings in the Case Continued.

Upon the first trial of the case, the District Court made the following finding of fact:

"X."

"That on the 26th day of December, 1903, a meeting of the stockholders of the defendant corporation was duly had; all of the stock of the defendant corporation was represented at such meeting, the said Zeckendorf being present in person and being furthermore represented by his attorney, also there in person.

At said meeting a resolution was offered, as follows:

'*Resolved*: That the agreement executed on May 20th, by the President and Secretary of the corporation with the Mammoth Copper Company and Albert Steinfeld, a copy of which is hereto attached, be and the same hereby is, rescinded, and that the said agreement and the resolution of the directors passed on said day be declared null and void.' "

(Copy of said agreement of May 20, 1903, above set out, was attached to said resolution.)

" The said resolution was unanimously passed, all of the stock of said corporation voting in favor thereof, the said Zeckendorf in person voting 250 shares of the stock of the said corporation in favor of the said resolution.

Said resolution so passed at said stockholders' meeting was not procured by false representation, misconduct or fraudulent practices, but it was manifest to the directors of said corporation and it is a fact that neither the said Zeckendorf nor any other stockholder present in voting for said resolution intended to advise, direct, consent or assent, to a rescission of any part of the said agreement of date May 20, 1903, or of any other agreement or resolution, whereby the said Silver Bell Copper Company became, or might have become, the owner of the entire purchase price of the said properties conveyed to the Imperial Copper Company. All of said stockholders of said company understood that the entire controversy, then existing, was with respect alone to the right to the custody of the said purchase price (cash and notes), and that no question of ownership therein or thereof was involved or being raised."

The District Court made another finding of fact to the effect that it did not pass upon the question as to whether Steinfeld was a trustee for the Silver Bell Copper Company by reason of certain facts alleged in the complaint because it had reached the conclusion that the entire proceeds of the sale were vested in the Silver Bell Copper Company by the contract of May 20th, 1903.

Upon his appeal *Steinfeld* urged, as the sole and paramount issue, that the District Court erred for the reason that *the evidence was insufficient to support its said finding as to the restricted purpose of such stockholder's resolution.*

The Supreme Court of the Territory reversed the judgment of the District Court upon the ground that because the said resolution was clear and unambiguous in its terms, it was the exclusive evidence of the intent of the parties, and that if any mistake was made by them it was not a mistake of fact, but one of law as to the legal consequences

of the resolution of rescission, and that such a mistake of law could not be relieved against by a Court of Equity. It sent the case back for a new trial upon the other issue, as to whether or not, under the allegations of the complaint, Steinfeld held the title to the "English" group of mines as a trustee for the Silver Bell Copper Company. In the view which was taken by the Supreme Court of the Territory on the paramount issue as to what was the intent of the parties at the stockholders' meeting, it became unnecessary for that Court to pass on the assignment of error made by Steinfeld on the appeal as to whether or not the evidence was sufficient to support that part of the finding of fact by the District Court which was attacked by him.

Upon the second trial a jury was again waived, and the case was resubmitted to the same Judge upon the same evidence adduced at the first trial, with the exception of certain evidence on behalf of Steinfeld relating to the relative values of the "English" group and the "Old Boot" group of mines, respectively, which was omitted by stipulation for the reason that Zeckendorf's complaint does not raise any issue in regard to the relative values of these two groups of mines.

Under the theory of the case as thus presented to the District Court, by the opinion of the Supreme Court of the Territory, there was nothing left to be tried in relation to the first cause of action except the question as to whether or not Steinfeld held the title to the "English" group of mines as a trustee for the Silver Bell Copper Company. Naturally the case was argued and submitted to the District Court upon that theory, as all parties to the action, including the Judge of the District Court, were bound by the opinion of the Supreme Court of the Territory. Consequently the District Court made no finding of fact upon the paramount issue made by the pleadings, as to whether or not a *mutual mistake* had been made by the parties in voting for the resolution of rescission at the stockholders' meeting, nor as to the time intent of the contract entered into thereunder by the Silver Bell Copper Company on the one hand and Steinfeld on the other.

In deference to the opinion of the Supreme Court of the Territory, whether it felt bound by the same or not, the District Court *expressly refrained* from making any finding of fact on the question as to whether or not *Steinfeld intended*

by his action at the stockholders' meeting to *acquiesce in a modification of the contract of May 20th, 1903*, in so far only as his right to the custody of the money and notes was concerned. The District Court found facts from which it reached the conclusion of law that Steinfeld did not hold and had not held title to the "English" group of mines as a trustee for the Silver Bell Copper Company; but fortunately for Zeckendorf it refused on that second trial to make *any* finding of fact as to whether or not the contract of May 20th, 1903, was rescinded, *either in whole or in part*.

Assuming as a presumption of law, doubtless in deference to the opinion of the Supreme Court of the Territory, *but not finding as a fact*, that the contract of May 20th, 1903, was rescinded *in toto*, the District Court thereupon rendered judgment in favor of Steinfeld dismissing the first cause of action. This part of the judgment of the District Court was *clearly erroneous*, for the reason that a finding of the ultimate fact that the contract of May 20th, 1903, had been rescinded *in toto* by a firm agreement between the Silver Bell Copper Company and Steinfeld was *essential* to support a judgment in favor of Steinfeld on the first cause of action. Steinfeld, however, had no right of appeal from this part of the judgment of the District Court, because he was not injured thereby. Moreover, he could not have assigned that so-called finding of fact "XXXII." as error on the part of the District Court upon the ground that it was not supported by the evidence adduced at the trial, because that purported finding is not in reality any finding whatever of an ultimate or even of a probative fact, but is a finding of the evidence itself, from which the ultimate fact, either that the contract was rescinded *in toto* or that it was rescinded and modified in and as to a particular *part only*, must be inferred and found by the trial court.

It is manifest, therefore, that through no fault of his own and merely because the Supreme Court of Arizona on the first appeal adopted a wrong theory of law in relation thereto, Steinfeld has not yet had his day in Court, upon this essential ultimate fact, upon which all of his legal rights or liabilities respectively in this

action depend. Moreover, it is not a question of law, but is a question of fact pure and simple, and this Court has so held in its opinion and decision in this case on the former appeal.

Zeckendoif appealed from the judgment of the District Court dismissing the first cause of action, and also from that part of the judgment of the District Court upon the second cause of action which relates to attorneys' fees. Steinfeld appealed from the judgment of the District Court upon the second cause of action only.

On this second appeal the Supreme Court of the Territory drew the *conclusion of law* from finding "XXXII" of the District Court, that the contract of May 20th, 1903, had been *rescinded in toto* at the stockholders' meeting, and consequently it affirmed the judgment of the District Court dismissing the first cause of action. It is *conceded* on behalf of Steinfeld that this was *clear error*, for the reason hereinbefore stated, to wit, that a finding was missing upon an essential ultimate fact; i. e., that the contract of May 20th, 1903, had been *rescinded in toto*.

An essential ultimate fact cannot be supplied by an Appellate Court as a conclusion of law from findings of probative facts, unless the missing ultimate fact arises from such probative facts and evidence so inevitably and necessarily as thus to become a question of law.

The Supreme Court of California clearly and forcibly enunciates the doctrine in the case of *Board of Education vs. Martin*, 92 Cal., 209, wherein it said :

"The Court has made no findings upon the issue of title presented by the pleadings, *but has included in its findings certain evidence* which was introduced at the trial. *Neither has it found the probative facts* from which the ultimate fact of title can be determined. It has been stated in several cases in this court that when the *findings of the court below contain such probative facts* that the ultimate fact in issue *necessarily results therefrom*, this court *will make the deduction of such ultimate fact*; but that, unless such ultimate fact *necessarily follows from the facts found*, the findings are insufficient, and

the judgment must be reversed for want of findings. It has never been held, however, or even stated, that findings of the court below which consist either in whole or in part of evidence presented at the trial, and do not purport to be probative facts involved in the issue, are a sufficient compliance with the requirements of the code. The jurisdiction of this court is appellate, and not original, and it is the function of a court of original jurisdiction to determine in the first instance whether the evidence offered in support of an issue is sufficient to sustain that issue. This court cannot pass upon that question until after the trial court has determined it, and then only in a proceeding to set aside such determination."

Or as this court stated the rule in the case of *Sun Mutual Ins. Co. vs. Ocean Ins. Co.* (107 U. S., at pp. 501-502) :

"The question, therefore, presented to us on this appeal is, not whether that might be true as a conclusion of fact from the circumstances stated in the findings of fact, but whether, upon the facts found, it must be true as matter of law.

The distinction is obvious and important. The circumstances in evidence might be such, that a jury, or a court sitting to try the case without a jury, would believe, as the more reasonable probability, according to the ordinary and observed course of human conduct, that the fact disputed had or had not actually taken place, and in that case the inference would be one of fact. On the other hand, the facts found might be such as to be, in point of law, inconsistent with any supposition, except that of the existence or non-existence of the fact in controversy, in which case the conclusion is necessary, independently of any belief based upon what is more or less probable, because the law declares the uniform effect of such a state and condition of circumstances."

This court, as we shall presently see, has always followed the same rule, in all classes of cases wherein its appellate

jurisdiction is limited to the review of questions of law only, and wherein consequently it is precluded from re-examining or retrying questions of fact.

Zeckendorf appealed to this court from the judgment of the Supreme Court of the Territory on both causes of action. Steinfeld appealed from the decision of the Supreme Court of the Territory on the second cause of action. This court affirmed the judgment of the Supreme Court of the Territory on the second cause of action, and reversed it as to the first cause of action, and remanded the case to the Supreme Court of the State of Arizona as successor of the Territorial Supreme Court, "for such further proceedings as may not be inconsistent with the opinion of this court."

The Supreme Court of the Territory had certified to this court a statement of the case, in the nature of a special verdict, in pursuance of the law of Congress in relation thereto. Upon such appeal this court, as declared in its former opinion in this case, was concluded as to facts by the statement so certified to it, and such statement alone was the basis of its judgment.

The Supreme Court of the Territory had adopted the findings of the District Court as its own, and with a few unimportant additions had certified the same to this court as its statement of the case.

In its opinion on the former appeal this court very correctly reasoned that the Supreme Court of the Territory had committed error by drawing the *conclusion of law* from such findings of fact, that the contract of May 20th, 1903, was necessarily rescinded *in toto* at the stockholders' meeting on December 26th, 1903, and also in holding that the intention of the parties in voting for the resolution of rescission was not material, because any mistake made by them was a mistake of law and not of fact. This court in explaining its judgment pointed out that the inference that it was the intention of the parties at the stockholders' meeting to authorize a total rescission of the contract is not the only inference which may be inferred from such findings; and, that, on the contrary, Zeckendorf may not have intended to rescind the contract *in toto*, but only so far as the right of Steinfeld to the custody of the money and notes is concerned; and that from those findings

of fact *alone*, "it is a fair inference that Steinfeld acquiesced in such modification."

This court pointed out that the Supreme Court of the Territory took too narrow a view of the case in its theory that as a matter of law the resolution of rescission, because it was unequivocal and unambiguous in its terms, was the *exclusive* evidence of the intent of the parties in their action at the stockholders' meeting, and declared that "in interpreting the action of the stockholders in passing the resolution, the facts and circumstances surrounding them may legitimately be looked to" (See *Zeckendorf vs. Steinfeld*, 225 U. S., 445).

Moreover, in looking alone to those facts and circumstances surrounding the stockholders at the time they passed the resolution, which appear in the findings of fact sent to this court by the Supreme Court of the Territory, this court said :

"We cannot agree with the Supreme Court of Arizona that the effect of this stockholders' meeting was to rescind so much of the former action as vested the proceeds of the sale in the Silver Bell Company. Nor can we agree, as the court held, that if the parties did intend to rescind only the former action as to the custody of the proceeds of the sale, they made a mistake only as to the legal effect of the rescinding resolution. On the other hand we think it is apparent from a consideration of the proceedings of that meeting, which the Supreme Court of Arizona has made a finding of itself, that the objection of Zeckendorf, the principal stockholder other than Steinfeld, was to so much of the former action as pertained to the turning over of the proceeds of the sale to Steinfeld, to be held by him for his indemnity. At the meeting no disposition was manifest to give Steinfeld the ownership of the proceeds of the sale of the English mines nor to treat any modification of the former action as a rescission of the entire matter. The discussion at that meeting throughout shows that the object of Zeckendorf was to get the money and the proceeds of the notes into the hands of a treasurer of the company who would give security therefor, and to have the entire proceeds

of the sale divided among the stockholders. There was no intimation that the money or notes then held by the treasurer would be taken from the Silver Bell Company, and one-half thereof turned over to Steinfeld as the vendor of the English group of mines."

In other words this court has decided that in interpreting the action of the stockholders in passing the resolution of rescission, the facts and circumstances surrounding them may legitimately be looked to, and that *this ultimate fact* of the *intention* of the parties must be found by taking into consideration and weighing not alone the resolution itself, but also all the facts and circumstances surrounding the parties which have any material bearing upon the question of their intent.

This court did not decide, however, that *no other facts or circumstances* which did *not* appear in the findings of fact or statement of the case sent to this court by the Supreme Court of the Territory on the former appeal can be considered or weighed in determining the action of the stockholders in passing the resolution, or in determining the intention of the parties to the contract of May 20, 1903.

The transcript of the record on the former appeal to this court contained considerable evidence in relation to the intent of the parties in adopting the resolution of rescission at the stockholders' meeting, which was not embodied in the aforesaid statement of the case and which consequently could not be and was not considered by this court.

Injustice to Deprive Steinfeld of Right to Have Issue of Fact as to Intent Tried Merely Because Territorial Supreme Court Adopted Wrong Theory of Law on First Appeal Thereto.

Steinfeld ought not to be deprived of the right to have the trial court make a finding of fact, from all the evidence as to the intent of the respective parties in voting for the resolution of rescission of the contract of May 20th, 1903, simply because the Supreme Court of the Territory of Arizona was wrong in its theory of the law in relation to that question upon the first appeal to it.

Undoubtedly, as stated in *Edmonston vs. McLoud*, 16 N. Y., 543, "where the Appellate Court can see that no possible state of proof applicable to the issues in the case will entitle the party to a recovery, it is not necessary or even proper that a new trial should be awarded."

This cannot be so in the case at bar, however, because Zeckendorf could take the stand again as a witness and could testify that in voting for the resolution of rescission at the stockholders' meeting he intended to rescind the contract of May 20th, 1903, *in toto*. Such testimony on his part would be absolutely consistent with all the other testimony heretofore given by him in this suit; and of course such testimony on his part would conclusively determine this controversy in Steinfeld's favor. Or if he testified otherwise in his own behalf, who can safely predict that a cross-examination may not bring the same result. It is a significant fact in this case that, although Zeckendorf testified fully on all other questions and issues involved in the case, he was absolutely *silent* as a witness upon the question of what his *intent* was and as to what his *understanding* was in voting for the resolution of rescission at the stockholders' meeting, notwithstanding the fact that Curtis and Steinfeld, respectively, each testified at some length in respect to his own intent and understanding in voting for that resolution, and to the effect that it was the intent of each to rescind the contract of May 20, 1903, *in toto*. Moreover, there was considerable other testimony before the trial Court on this question which was not before this Court on the former appeal.

See, also,

Griffin vs. Marquardt, 17 N. Y., 28.

Ball vs. Rankin, 101 Pac., 1105 (Oklahoma).

Interpretation of Mandate Adopted by Superior Court of Arizona.

The mandate of this court, which was issued after its decision on the former appeal and was directed to the Supreme Court of the State of Arizona, concludes as follows :

"You therefore are hereby commanded that such
"further proceedings be had in said cause * * *

"as according to right and justice and the laws of the United States ought to be had."

This mandate was transmitted by that court to the Superior Court as successor to the District Court of the Territory.

Very soon after your mandate reached the Superior Court a motion for judgment thereon was filed by the attorneys for Zeckendorf, and objections and exceptions thereto were filed by the attorneys for Steinfeld. When this motion came on for hearing the Superior Court announced that it construed the opinion and decision of this court as being in effect a direction for it to enter judgment in favor of Zeckendorf on the first cause of action, and as depriving it of any right to exercise any judicial discretion whatever upon the question as to whether or not Steinfeld was entitled to a trial *de novo* upon the issue as to what was the intention of the stockholders in voting for the resolution of rescission of the contract of May 20th, 1903, or as to whether Steinfeld then or subsequently acquiesced in a modification of that contract in so far only as his right to the custody of the money and notes which were the proceeds of the sale of the mines is concerned.

The Superior Court expressly stated and it is a part of this record on appeal that it did *not* base its action in entering judgment on the motion of the attorneys for Zeckendorf, upon an examination of the evidence in the case and that it did *not* take such action as the result of any exercise of its own judicial discretion, and that the objections of Steinfeld to the entry of the judgment were overruled and its order for the entry of the judgment was made for the reason that it was legally bound by that mandate to enter judgment in favor of Zeckendorf (See transcript, pages 151 to 153).

Thereupon the attorneys for Steinfeld urged further objections and exceptions to the *form and substance of the judgment* which the attorneys for Zeckendorf had prepared and attached to their motion, and the Superior Court made reply to these additional objections as follows :

"THE COURT : It would take a great deal of research on the part of the Court going into the case at this time and studying and reading over the record to be able to dictate himself a proper form of judgment.

"MR. HENY : Yes.

"THE COURT: And for that reason the Court is led to rely largely upon the form of judgment submitted by counsel for the plaintiff. If they include anything in that form of judgment that should *not* be there when it is brought to the attention of the Supreme Court of the United States, of course, it will be stricken out, or an order made back to this Court to correct it. Thereby, they don't make anything. In fact they lose if they are not careful enough to draw that judgment properly. It is for the benefit of the defendants if the judgment is not in the proper form."

See transcript, page 140.

Proper Interpretation of Mandate and Opinion and Decision on Former Appeal.

This Court can now understand why we are here again with this case. We have hereinafter pointed out errors in the amounts of various items of the judgment which aggregate over (\$100,000) one hundred thousand dollars, as to which, in our opinion, there is little, if any, room for reasonable controversy.

Assuming that this Court will grant our request we shall herein address ourselves to the question as to whether or not, under the former opinion and decision of this court, Steinfeld was entitled to a trial *de novo* upon the essential issue of fact, to wit, as to what was the true intent of the parties in their action in voting for the resolution of rescission at the stockholders' meeting, and particularly upon the question of fact as to whether or not Steinfeld then or ever intended to and did acquiesce in a modification of the contract of May 20th, 1903, in so far only as his right to the custody of the money and notes which were the proceeds of the sale of the mines is concerned.

In the case of Board of Supervisors vs. Kennicott, 94 U. S., 449, this Court said:

"Our mandates are to be interpreted according to the subject matter of the proceeding here, and, if possible, so as not to cause injustice," etc.

Hence, it is proper to inquire what was the "subject matter" of the proceeding here on the former appeal?

This Court announced in its former opinion, as we have seen, that the findings of fact sent to it by the Supreme Court of the Territory must "*alone*" be the basis of its judgment, citing *Eagle Mining Co. vs. Hamilton*, 218 U. S., 513. In that case this Court said:

"The record before us contains the testimony taken before the Referee, and the letters and documents which, in connection with the testimony, he submitted to the Court in his report; and the argument here is directed largely to the effect of the evidence and to the findings of the Court below as to matters of fact.

But we are not at liberty to review these findings of fact. We cannot go behind the findings to ascertain whether they are justified by the evidence. Under the act of April 7, 1874, chapter 80 (18 Stat. at L. 27), the jurisdiction of this court, upon this appeal, is limited to the inquiry whether the findings of fact made by the court below support its judgment, and to a review of exceptions which have been duly taken to rulings upon the admission or rejection of evidence."

In the case of *Idaho and Oregon Land Co. vs. Bradford*, 132 U. S., page 513, this Court said:

"Congress has prescribed that the appellate jurisdiction of this court over 'judgments and decrees' of the Territorial courts, 'in cases of trial by jury shall be exercised by writ of error, and in all other cases by appeal;' and 'on appeal, instead of the evidence at large, a statement of the facts of the case *in the nature of a special verdict*, and also the rulings of the court on the admission or rejection of evidence when excepted to, shall be made and certified by the court below,' and transmitted to this court with the transcript of the record (Act of April 7, 1874, c. 80, sec. 2, 18 Stat., 27, 28).

"The necessary effect of this enactment is that no judgment or decree of the highest court of a Territory can be reviewed by this court *in matter of fact*, but only

in matter of law. As observed by Chief Justice WAITE, 'We are not to consider the *testimony in any case*. Upon a writ of error, we are confined to the bill of exceptions, or questions of law otherwise presented by the record; and upon an appeal, to the *statement of facts* and rulings certified by the court below. The *facts* set forth in the *statement* which must come up with the appeal are *conclusive on us*.'"

Hecht vs. Boughton, 105 U. S., 235, 236.

* * * * *

"It must also be borne in mind that, as already seen, in either class of cases, whether equitable or legal, coming up by appeal from a Territorial court after a hearing or trial on the facts, the evidence at large can not be brought up (*as it is in cases in equity from the Circuit Courts of the United States*), but only 'a statement of facts in the nature of a special verdict,' and rulings made at the trial, and duly excepted to, on the admission or rejection of evidence. Consequently the authority of this court, on appeal from a Territorial court, is limited to determining whether the court's findings of fact support its judgment or decree, and whether there is any error in rulings, duly excepted to, on the admission or rejection of evidence; and does not extend to a consideration of the weight of evidence, or its sufficiency to support the conclusions of the court."

It will be observed that this Court has therein called attention to the fact that "*the evidence at large*" is brought before it on appeals "in cases in equity from the Circuit Courts of the United States." It is important to keep this distinction in mind, because in their failure to do so lies the vice of the arguments presented by the attorneys for the appellees in the case at bar. In every case cited by them to the lower Courts in support of their argument, wherein this Court has held that its decision on a prior appeal is *res adjudicata* as to the facts, the evidence at large in the particular case had properly been brought before this court for re-examination and consideration

as to its sufficiency to support the findings of fact made by the trial court. As before stated, it is *for this reason* that the decision of this Court in each of such cases was conclusive upon the *facts* which had been brought "before" it and "disposed of" by it, as well as upon the questions of *law* which were involved in the issues presented on appeal.

We invite particular attention to the declaration of this Court that "the necessary effect of this enactment is that *no* judgment or *decree* of the highest Court of a *Territory* can be reviewed by this Court in matter of *fact*, but *only* in matter of *law*. As observed by Chief Justice WAITE, 'We are *not to consider the testimony in any case.*'"

In support of its decision from which this appeal has been taken by Steinfeld, the Supreme Court of the State of Arizona cites the following decisions of this court, to wit:

In re Potts, 166 U. S., 263.

In re Sanford Fork & Tool Co., 160 U. S., 247.

Gaines vs. Rugg, 148 U. S., 228.

No one of these decisions is in point, however, for the reason that each of these cases was an appeal from a Circuit Court of the United States in an equity suit, and the appellate jurisdiction exercised by this Court therein in relation to facts was essentially different from that exercised by it in the case at bar.

This court has repeatedly and uniformly held that such an appeal, *unless expressly restricted*, brings up *both law and fact*, whereas a writ of error brings up matters of *law only*, and that in *all classes of cases* where the *facts* are brought before it on "*appeal*" (using the word in its technical sense), *for examination and consideration*, its decision becomes *res adjudicata* as to all of said facts, and that none of such facts can thereafter be re-examined or retried by either the trial court or itself.

Indeed, in the case of *Supervisors vs. Kennicott*, 94 U. S., 498, this court went so far as to hold that even when its mandate to the Circuit Court of the United States in a suit in Equity had expressly remanded the case "with directions to award a new trial," and had also "commanded that such execution and further proceedings be had in conformity to the opinion and decree of this court as according to right and jus-

tice ought to be had," it could *not* have intended to direct a new trial, because

"Technically there can be no new trial in a suit in equity; and as our mandates are to be interpreted according to the subject matter of the proceedings, and if possible so as not to cause injustice (*Storey v. Livingston*, 12 Peters, 359) it is proper to inquire what must have been intended by the use of that term in the decree, since it cannot have its ordinary meaning."

Of course the reason for this rule is obvious. On an appeal in an equity case from the Circuit Court of the United States the evidence is brought before this court for examination and consideration. Consequently this court passes upon the *merits* of the controversy, and its decision is *final* upon all questions of *fact and law*.

In the case of *Dower vs. Richards*, 151 U. S., 659, this court said:

"An *appeal* is a process of civil law origin, and removes a cause *entirely*, subjecting the *fact* as well as the law to a review and *retrial*; but a *writ of error* is a process of common law origin, and it removes *nothing* for re-examination but the *law*."

In that case this Court gives a very interesting and instructive historical review of its appellate jurisdiction, as it has existed under and been changed from time to time by regulating Acts of Congress, since its creation.

This court has, however, repeatedly and uniformly held that in all classes of cases as to which its jurisdiction on an appeal is expressly restricted by act of Congress to questions of *law only*, it has no power or authority to examine evidence or to review or retry facts or to supply any missing essential ultimate fact or facts by inference or intendment. In other words, it has held that on an appeal in which its jurisdiction is so expressly limited, either by Congress or by its own rules (in cases where Congress has authorized it to make rules to govern appeals) its power and authority in relation to questions of fact is "*strictly analogous*" to its jurisdiction on a writ of error

to the Circuit Court of the United States in a common law action.

As was said by this court in the case of *Burr vs. Des Moines Co.*, 68 U. S., 99:

"The statement of facts on which this court will inquire, if there is or is not error in the application of the law to them, is a statement of the *ultimate facts* or propositions which the evidence is intended to establish, and *not the evidence* on which those ultimate facts are supposed to rest. The *statement must* be sufficient in itself, *without inferences or comparisons, or balancing of testimony, or weighing evidence* to justify the application of the legal principles which must determine the case. It must leave *none* of the functions of a jury to be discharged by this court, but must have *all* the sufficiency, fullness, and perspicuity of a *special verdict*. If it requires of the court to *weigh conflicting testimony, or to balance admitted facts, and deduct from these the propositions of fact on which alone a legal conclusion can rest*, then it is *not* such a statement as this court can *act upon*. The paper before us 'is evidence of facts, and *not the facts themselves* as agreed or found.' It is obvious that if the whole of this paper were presented by a jury as a *special verdict*, it would be *objectionable*, as presenting the evidence of facts, and *not the facts themselves*, which must determine the issue."

The rule in common law actions is very clearly enunciated, and its application is very forcibly illustrated in the case of *Lincoln vs. French*, which was before this court three different times—twice by writ of error and once by application for mandamus, and which is reported as follows:

French vs. Edwards, 21 Wall., 147.

French vs. Edwards, 91 U. S., 423.

Lincon vs. French, 105 U. S., 614.

In the case of *French vs. Edwards*, 21 Wall., 147, the action was commenced in 1866, and the final judgment of this Court was not entered until October, 1881.

French brought an action for ejectment against Edwards and twelve other defendants for a piece of land in California,

prior to the action French had conveyed the land to certain trustees for donation to a railroad company in the event and on condition precedent of the construction of its line of railroad, the property to be reconveyed to French in the event that the railroad should not be constructed within a stipulated time.

The action being one of ejectment, the chief issue was whether the legal title was in French. If the legal title was in the trustees, while French might have had redress in equity, ejectment was improper.

It was brought in the Circuit Court for the District of California. It was first tried by a jury, which rendered a verdict for the defendants. Upon appeal the judgment was reversed and a new trial ordered.

Upon the second trial, the parties *waived a jury*, and the case was tried before the Court, which made specific findings of fact and conclusions of law.

This Court said :

" If it had been one of the facts found by the court below, that the title was still in the trustees, the case would have presented a different aspect. It is stated only as a conclusion of law, arising upon the facts found. Such findings of facts are regarded in this court in the light of special verdicts. ' If a special verdict on a mixed question of fact and law, find facts from which the court can draw clear conclusions, it is no objection to the verdict that the jury themselves have not drawn such conclusion, and stated them as facts in the case.' The presumption of the reconveyance arises here, with the same effect upon the special findings as if it had been expressly set forth as one of the facts found.

The conclusion of law that the title was still in the trustees was, therefore a manifest error. On the contrary, it should have been presumed that Martin and Edwards had reconveyed, and that the title had thus become reinvested in the plaintiff, and the court should have adjudged accordingly.

Judgment reversed and the case remanded, with directions to proceed in conformity to this opinion."

We believe it will be conceded that the above quoted language of the Court is tenfold stronger in favor of French than is the language of this Court in favor of Zeckendorf in the instant case.

Here are plain, vigorous declarations that common honesty and the law require that French should get back his property. There is the further declaration that the presumption of a reconveyance by the trustee arises with the same effect as if such reconveyance had been expressly set forth as one of the facts found; whereas, in the instant case, this Court confined itself to saying that it was a "fair inference" from the facts found that Steinfeld intended to modify the contract and not to rescind it *in toto*. Furthermore, the opinion in French vs. Edwards, with which the mandate required the lower Court to conform, contained the final emphatic declaration, absent either expressly or by implication in the opinion in our case, that the Court below should have adjudged that the title had become reinvested in French.

The mandate, however, in the French case, did not direct judgment in favor of the plaintiff, despite this strong language of the opinion. It read:

"Judgment reversed and the case remanded with directions to proceed in conformity with this opinion."

When the case again reached the Circuit Court of the United States for the District of California that court proceeded to try the action *de novo*, and thereupon an application for a mandamus was made to this court to compel the Circuit Court to enter judgment in favor of French. In its opinion on the mandamus application this court said:

"Our action only precludes that court from adjudging in favor of the defendants upon the special facts found and sent here for our opinion. In all other respects it is at liberty to proceed in such manner as according to its judgment justice may require."

French vs. Edwards, 91 U. S., 423.

This court applied exactly the same rule in the case of *ex parte Medway*, 90 U. S., 504. The extent and character of

the jurisdiction which was exercised by this court in the Medway case is clearly stated in its opinion in that case.

It will be noticed that the character of jurisdiction which was exercised by this court on appeal in the case at bar is exactly similar to that which was exercised by it in the Medway case, and in that case, which was an application to this court for a mandamus to compel the Court of Claims to refrain from retrying any of the issues of fact which had been before this court on the first appeal, the attorney for the petitioner made precisely the same contention as that of the appellees in the case at bar.

In reply to that argument this court said :

" Our mandate required the Court of Claims to proceed in the cause remanded in conformity to law and justice. We did not undertake to direct what law and justice did require, any further than to say that *upon the finding of facts appearing in the record sent to us upon the appeal*, the judgment was erroneous. *In everything else* the Court of Claims was left free to proceed with the cause in its own way and according to *its own judicial discretion*."

If the Superior Court of Arizona, in the exercise of its sound discretion, had proceeded to permit a trial *de novo* in the case at bar, and if Zeckendorf had applied to this court for a petition for mandamus to prevent that court from proceeding to try any of the issues of fact which were discussed by this court in its opinion on the former appeal, we would then have an exact parallel to the Medway case, except that the jurisdiction of this court in the Medway case was limited only by its own rules, whereas its jurisdiction in the case at bar is expressly limited by the very act of Congress which confers appellate jurisdiction upon it in this class of cases.

We would also have had an exact parallel in every respect to the case of French vs. Edwards, 91 U. S., 423.

In that case, this Court, having previously expressed itself very emphatically on the merits of the case, nevertheless said on a subsequent appeal :

" It is plain, therefore, that this Court only considered that the conclusion of law of the lower court,

that the title was still in the trustees, was not warranted by the facts found, and that the case would have been differently decided had what was thus stated as a conclusion of law been one of those facts. It is not the intention of this Court to hold that the presumption was a conclusive one, not open upon a trial to rebuttal, because it was considered to properly arise upon the facts then presented by the record. When the case went back upon our decision for further proceedings—*which, this being an action at law, were necessarily those of a new trial*—the fact as to a reconveyance was open to proof, and was not to be taken as conclusively established from the force of the presumption that it had been made. * * * The fact having been established, against the presumption mentioned, that the trustees never reconveyed the premises or any part thereof to the plaintiff, the title remains in them, and with it the right of possession" (pp. 616, 617).

Lincoln vs. French, 105 U. S., 614.

We cannot conceive of plainer language, or of a case more precisely in point.

Had this Court felt that the question of intent was conclusively established by the facts found, it would have directed judgment in favor of Zeckendorf. The fact that it did not do so is, under the law as laid down in Lincoln against French, conclusive that its intention was that a new trial should be had, at which new trial it should be the duty of the Court to ascertain and find out what was the true intent of the parties.

It must always be borne in mind that the language of the resolution unambiguously calls for a rescission *in toto*.

The resolution is as follows :

" *Resolved*, that the agreement executed on May 26, 1903, by the President and Secretary of the corporation, the Mammoth Copper Company, and Albert Steinfeld, a copy of which is hereto attached, be and the same is hereby rescinded, and that the agreement and resolution passed on said day be declared null and void."

The application of this rule is also clearly illustrated in the case of Sun Mutual Insurance Co. vs. The Ocean Insur-

ance Co., 107 U. S., 485, which was an Admiralty case. The reason for the rule and its application are forcibly and clearly discussed in that case and the doctrine therein announced is, we submit, conclusive of the case at bar.

That this same rule is applicable to cases on appeal from the Supreme Court of the territory of Arizona is shown by the opinion of this court in the case of U. S. Trust Co. vs. New Mexico, 183 U. S., 535, where this court said :

"The case was heard in the District Court upon an agreed statement of facts, which was thereafter certified by the Supreme Court of the Territory as a statement of facts under the act of April 7, 1874. We have had several occasions to consider the effect of an agreement of the parties as to the facts (See *Wilson, Receiver, etc., vs. The Merchants Loan and Trust Co.*, 183 U. S., 121, and cases cited in the opinion). An agreed statement of facts may be the equivalent of a special verdict or a finding of facts upon which a reviewing court may declare the applicable law if such agreed statement is of the ultimate facts, but if it be merely a recital of testimony or *evidential facts*, it brings *nothing* before an appellate court for consideration. *The same rule obtains in cases of appeals from Territorial Courts* under the act of 1874. That act in terms provides that :

" ' On appeal, instead of the evidence at large, a statement of the facts of the case in the nature of a special verdict, and also the rulings of the court on the admission or rejection of evidence, when excepted to, shall be made and certified by the court below.' *Stringfellow vs. Cain*, 99 U. S., 610; *Idaho & Oregon Land Company vs. Bradbury*, 132 U. S., 509.

" Tested by the various authorities just cited, the certified statement of facts is *insufficient*, and presents nothing for our examination. This disposes of most of the questions discussed by counsel."

The case of *Wilson vs. Merchants Loan & Trust Company*, 183 U. S., 121, is also very pertinent because of the similarity of facts. In that case the Court said :

" The difficulty we meet, which prevents the decision of the case from resting on the statement of facts, lies in the omission therefrom of any finding or agreement upon the question of fact *whether the pledgor had or had not consented to the change*, and *instead of any such finding or agreement there is placed in the statement certain correspondence from which, together with other facts stated, an inference of consent or perhaps ratification might be drawn*, but is not found or agreed upon, thus leaving the ultimate fact of consent or non-consent a matter of *inference*, and an inference of *fact* and not of law, and this is a *material fact* arising upon the statements as agreed upon.

" Neither is there any finding upon the question of the consent of the assignee of the pledgor, to the substitution of the stock, or upon the question of ratification by him. There are facts from which the consent or ratification might be inferred, or the contrary, but there is no finding of any ultimate fact regarding the matter.

" The result of the decisions under the statutes providing for a waiver of trial by jury, and the proceedings on a trial by the court, Rev. Stat., sec. 649, and Rev. Stat., sec. 700, is that when there are special findings they must be findings of what are termed ultimate facts, and not the evidence from which such facts might be but are not found. If, therefore, an agreed statement contains certain facts of that nature, and in addition thereto, and as part of such statement, there are other facts of an evidential character only, from which a material ultimate fact might be inferred, but which is not agreed upon or found, we cannot find it, and we cannot decide the case on the ultimate facts agreed upon without reference to such facts. In such case we must be limited to the general finding by the court. We are so limited because the agreed statement is not a compliance with the statute.

As to what is necessary in special findings or in an agreed statement of facts, the authorities are decisive. It is held that upon a trial by the court, if special findings are made, they must not be mere report of the evidence, but a finding of those ultimate facts on which the law must determine the rights of the parties, and if the findings of facts be general, only such rulings of the court, in the progress of the trial, can be reviewed as are presented by a bill of exceptions, and in such case the bill cannot be used to bring up the whole testimony for review, any more than in a trial by jury. *Norris vs. Jackson*, 9 Wall., 125."

In the foregoing case there was an absence of a finding to the effect that "the pledgor had or had not consented to the change." Instead of such a finding there was placed in the statement of facts

"certain *correspondence* from which, together with other facts stated, an *inference* of consent or perhaps ratification might be drawn, but it is not found or agreed upon; thus leaving the ultimate fact of consent or non-consent a matter of inference, and an *inference of fact* and not of law, and this is a *material fact* arising upon the statement as agreed upon."

The condition of that case was exactly parallel with the case at bar. The proceedings at the stockholders' meeting, including the conversations between the parties, and the written contract of rescission, were inserted in the so-called finding of fact "XXXII," and this court has said in its opinion on the former appeal in this case that it is "a fair inference that Steinfeld acquiesced in such modification of the contract." Or in other words, this court has said that it is a fair inference from the evidence which is embodied in the aforesaid finding of fact, that "Steinfeld acquiesced in the modification of the contract." It is obvious, however, that this essential ultimate fact was not found by either the trial court or the Supreme Court of the Territory, and that the findings of fact which were certified to this court had left this ultimate fact of consent

or acquiescence on the part of Steinfeld as "a matter of inference, and an inference of fact and not of law, and it is a material fact arising upon the statement"; i. e., arising upon the statement of the case which was certified to this court by the Supreme Court of the Territory.

But in the foregoing case this court expressly said that

"if therefore an agreed statement contains certain facts
 "of that nature, and in addition thereto and as a part of
 "such statement there are other facts of an evidential
 "character only from which a material fact might be
 "inferred, but which is not agreed upon or found,
 "we cannot find it, and we cannot decide the case on the
 "ultimate facts agreed upon without reference to such
 "other facts."

Hence in interpreting the decision and opinion of this court on the former appeal we are bound to presume that this court did not intend to make a finding of fact which must be treated as *res adjudicata*, to the effect that "Steinfeld acquiesced in the modification of the contract" or to the effect that Zeckendorf and Steinfeld both intended to modify the contract only in so far as it related to the custody of the money by Steinfeld. For to give such an interpretation or construction to the former opinion of this court would be to presume that it intended to exceed the jurisdiction which it had prescribed for itself in that very decision, and which it has so frequently laid down in other decisions as the limitation of its power.

Let us therefore proceed to apply this rule to the proper interpretation of the opinion of this Court in the case of Zeckendorf against Steinfeld; and particularly for the purpose of determining what effect, if any, shall be given to the inferences, presumptions or conclusions of fact which this Court has drawn from the evidence which appears in that part of the statement of the case in the nature of a special verdict, which we have herein referred to as the so-called finding of fact number "XXXII." Of course, if this Court, under its own unbroken line of decisions, has no power or authority or jurisdiction to supply an essential, ultimate fact by "intendment or inference" from the findings of fact or from a statement of

facts in the nature of a special verdict, which was certified to it by the Supreme Court of a Territory, even if there is sufficient evidence in the special verdict itself from which the trial court might have found the fact to be inferred, it is manifest that we must not give such an interpretation to its opinion as is contended for by the attorneys for the appellee herein, unless it shall plainly appear that no other possible interpretation can reasonably be placed upon the language which was used by this Court.

In interpreting its opinion we must, of course, keep in mind the fact, as told to us in that very opinion, that it was limited in its jurisdiction to the single question of law, Do the facts as certified to it by the Supreme Court of the Territory support the judgment which was rendered by that Court? We must be constantly guided by the fact that this question of law is the "subject matter" and the *whole subject matter*, which was before this Court when its opinion was written, and that we must construe its language accordingly.

Who will contend that if the findings of fact which were certified to this Court by the Supreme Court of the Territory had been made by a jury in a common law case, the trial court, or any appellate court, would supply the missing essential, ultimate facts without which no judgment in favor of Zeckendorf can possibly be maintained in this suit?

See also *Barnes et al. vs. Williams*, 11 Wheat., 414.

Another instructive case is that of *Powers vs. United States*, 119 Fed., 563, decided in 1903 by the Circuit Court of Appeals, Sixth Circuit, Justices LURTON, DAY and SEVERENS presiding.

Our position, restated, is that this court was correct in reversing the judgment of the Supreme Court of the Territory of Arizona, because in the statement of the case which was certified to this court there was no finding of the essential ultimate fact that the contract of May 20th, 1903, was rescinded *in toto*, and that consequently the findings of fact did not support the judgment of that court dismissing the first cause of action, but that this court did not, by its opinion and decision, intend to direct either the Supreme or the Superior Court of the State of Arizona to enter a judgment in favor of Zeckendorf

on the first cause of action, without any exercise of discretion on its part as to whether or not, under the case made by the pleadings, there was any probability that upon a new trial conducted in accordance with and in pursuance of the law applicable thereto as expressed by this court in its opinion, Steinfeld might properly secure findings of fact which would justify and require a judgment in his favor on the first cause of action.

Moreover, we most earnestly contend that this court did not intend by its opinion and decision on the former appeal to make a finding of fact that "Steinfeld acquiesced in a modification of the contract," so as to conclusively bind the Superior Court of Arizona if, by other evidence than that which appeared in the findings of fact which were before this court on the former appeal and on which alone its judgment was based, it should be made to appear to the trial Court that Steinfeld did *not*, by voting in favor of the resolution to rescind the contract at the stockholders' meeting, or by anything that was said or done there on his behalf, *intend* to acquiesce in a modification of the contract in so far only as his right to the custody of the money and notes which were the proceeds of the sale is concerned.

And we further most earnestly contend that this court did not intend, by its opinion and decision on the former appeal, to hold that the findings of fact which were then before this court, and upon which alone its judgment was based, were sufficient to support a judgment in favor of Zeckendorf on the first cause of action; because if there was a sufficient finding of fact therein by the trial court or by the Supreme Court of the territory that Steinfeld had acquiesced in the modification of the contract, this court would certainly not have argued that it was "a fair inference of fact" *to be drawn from those findings of fact* that "Steinfeld had acquiesced in the modification of the contract."

Manifestly it cannot be *presumed* that the Supreme Court of the Territory of Arizona intentionally made any finding of fact which it intended to be to the effect that Steinfeld intended by his action in voting for the resolution of rescission at the stockholders' meeting to acquiesce in a modification of the contract of May 20th, 1903, in so far only as his right to the custody of the money and notes is concerned; because

from such a finding of fact the Supreme Court of the Territory of Arizona could not possibly have drawn the conclusion of law that the judgment of the District Court in dismissing the first cause of action was not erroneous. Hence it is clear that this finding of fact, which is *essential* to support a judgment in favor of *Zeckendorf* on the first cause of action, *was missing*, and under your repeated and uniform decisions as to the limitation of your jurisdiction in this class of cases on appeal, and even under your decision in this very case on the question of your jurisdiction, it cannot be presumed that this court intended to supply *this missing essential ultimate fact by inference*. If any other reasonable construction can be placed upon the language which was used by this court in its opinion on the former appeal, such construction and interpretation thereof must of course be adopted.

Additional Errors in Judgment as Entered.

Apart from the fundamental error of denying to Appellant his day in Court, the judgment is erroneous and excessive in the full amount of the following particulars :

Amount paid to Francis and Volkert..	\$12,700.	
Interest thereon	7,201.75	
	<hr/>	\$19,901.75
Franklin garnishment.....	\$25,750.	
Interest thereon.....	14,613.11	
	<hr/>	\$40,363.11
		<hr/>
		\$60,264.86
Ten per cent. for attorney's fees on all the foregoing items.....		\$6,026.48
Other Additional Attorney's Fees		\$33,098.65
Compound interest on second cause of action....		1,670.00
		<hr/>
Total		\$101,059.99

We shall discuss these items separately in the order above enumerated.

Francis & Volkert Item \$12,700.

In the proposition which Steinfeld made to The Silver Bell Copper Company on July 15th, 1901, it was expressly recited that Steinfeld had entered into a contract on May 16th, 1910, with Margaret Francis and Julius Volkert, under which he agreed to pay them the sum of \$12,500 whenever the "English" group of mines should be sold, and that this amount was in addition to the sum of \$2,780 which he had already expended in cash in purchasing their interest in the "English" group of mines (See Transcript, 311, 312).

A part of that proposition reads as follows :

" If you will agree to assume and perform all the matters and things agreed to be done by me or assumed by me in my said agreement with said Margaret Francis and Julius Volkert of date May 16th, 1900, and further save and keep me harmless from any loss or expense by reason of my having entered into said agreement: Then I will agree as follows " (See transcript, 314).

This proposition so made to the Silver Bell Copper Company was renewed by Steinfeld on May 20, 1903, at the time of the sale of the mines, with certain modifications which did not change this particular item of the proposition in any respect whatever (See transcript, pages 322 to 324 inclusive).

On May 20th, 1903, the Board of Directors of the Silver Bell Copper Company unanimously adopted a resolution reading as follows :

" Resolved, that the proposition of Albert Steinfeld, as herewith submitted, be and the same hereby is accepted, and that he (said Steinfeld) be forthwith paid by this corporation the sum of Eighteen thousand one hundred and seventeen dollars (\$18,117.00) and that out of the first moneys received by this company upon the promissory notes of the Imperial Copper Company he (said Steinfeld) as treasurer of this company *shall retain sufficient moneys* to pay the amounts necessary to be paid Margaret Francis and Julius H. Volkert under

the agreement with them aforesaid; and to pay to the assigns or legal representatives of Carl S. Nielsen (he being now deceased) and of Mary Nielsen the amount necessary to be paid under the agreement with said Nielsens aforesaid and when said amounts respectively become due pay the same to the parties entitled thereto."

At the stockholders' meeting on December 26, 1903, Judge BARNES speaking for Zeckendorf, among other things, said:

"We feel that the *moneys on hand* ought to be divided up; *first, to the paying of Mrs. Francis, whatever it is, \$12,000*; to the paying of Mrs. Nielsen; and that the balance of the money ought to be paid to the stockholders." * * *

"So that we think that the moneys on hand, the proceeds of the sale of this property, *after deducting sufficient to pay Mrs. Nielsen and Mrs. Francis*, that the balance of this money be distributed, and that there ought to be a dividend made of these funds." * * *

"If this be done, *and the money be reserved or paid to Mrs. Nielsen and Mrs. Francis*, and a dividend be made of the money on hand," etc.

(See transcript, pages 330 and 331).

All of the foregoing appear in the statement of the case in the nature of a special verdict which was sent to this court by the Supreme Court of the Territory of Arizona on the former appeal.

In his third amended complaint, upon which this case was tried, Zeckendorf alleges "that Steinfeld, *as the agent or the representative of and for the benefit of the Nielsen Mining and Smelting Company*, purchased from Francis and Volkert their interest in the English group of mines, paying them therefor the sum of \$2,500, and entering into a further contract with said parties to pay to them the further sum of \$12,500 out of the proceeds of the sales of said mines, in the event the same were sold, and *which said sum of \$12,500 was paid by said Albert Steinfeld to said Francis and Volkert out of the pro-*

ceeds received from said Imperial Copper Company for the sale of said mines."

In his answer to that complaint Steinfeld denies that he paid said sum of \$12,500 to Francis and Volkert "out of the proceeds or any of the proceeds received from the Imperial Copper Company," and alleges that he did pay said sum of \$12,500 to Francis and Volkert out of his own *personal* funds on or about January 10th, 1904.

At the *first* trial of this cause the District Court made the following finding of fact :

XVII.

" That on the 9th day of January, 1904, said Albert Steinfeld paid to Francis and Volkert the sum of \$12,700 for the benefit of said Silver Bell Copper Company. That on the 23rd day of January, 1904, said Albert Steinfeld paid to Mary Nielson the sum of \$10,000 for the benefit of said Silver Bell Copper Company. That on the 26th day of December, 1903, after the adjournment of the stockholders' and directors' meetings held on said day, said Albert Steinfeld paid to J. N. Curtis, Treasurer of the said Silver Bell Copper Company, the sum of \$18,117.

" That said Albert Steinfeld is entitled to a credit of said sums on the amounts above found to be wrongfully taken by him from said corporation on the 16th day of January, 1905 " (Transcript, page 216).

Zeckendorf's original complaint in this action was filed on January 27th, 1905, in the District Court of the Territory of Arizona. On the second trial of this action, from the judgment in which an appeal was subsequently perfected to this court, the District Court made the following finding of fact :

" XXXIV."

* * * * *

" That on the 9th day of January, 1904, said Albert Steinfeld paid to Francis and Volkert the sum of \$12,700 " (Transcript, page 407).

The additional \$200 is presumably interest on the principal sum of \$12,500, from May 20th, 1903, the date it became due, until January 9th, 1904, the date of payment.

If we examine the second paragraph of the judgment of the Superior Court of Arizona which is now here on appeal, we find that the amount for which judgment is therein given is obtained by taking the figures which appear in finding "XXXVI" of the statement of the case in the nature of a special verdict which was sent to this court by the Supreme Court of the Territory of Arizona on the first appeal, to wit, the sum of \$145,743.75, which was paid to Albert Steinfeld by J. N. Curtis, the Treasurer of the Silver Bell Copper Company, in cash, on January 16th, 1904, and by deducting therefrom the sum of \$18,117 which Steinfeld was entitled to receive from the Silver Bell Copper Company as a part of the consideration for that part of the contract of May 20th, 1903, which Zeckendorf claims has never been rescinded.

The \$10,000 payment which was made by Steinfeld to Neilsen on January 23d, 1903, was deducted by the District Court from the amount which Steinfeld received as dividends on the 300 shares of Neilsen stock in giving judgment against him on the second cause of action.

Steinfeld has not been given credit anywhere, however, for the \$12,700 which he paid to Francis and Volkert on January 9th, 1904, just one week *prior* to the date on which he received said money from Curtis. Yet the payment of this money to Francis and Volkert by the Silver Bell Copper Company out of the sale of the joint groups of mines was a material and substantial part of the consideration which Steinfeld was to receive from that part of the contract of May 20th, 1903, which vested the ownership of the entire proceeds of the sale in that corporation, and which part of said contract it is claimed and alleged by Zeckendorf in his complaint herein, was never rescinded. This sum must be deducted from the balance of \$127,626.75 for which judgment is given against Steinfeld in said second paragraph; and of course the interest upon this item of \$12,700, amounting to \$7,201.75, from January 16th, 1904, to the date of the entry of the aforesaid judgment, must likewise be deducted from the item of \$65,226.43 for interest which is specified in the second paragraph of said judgment. In other words, the

amount specified in the second paragraph of the judgment is too large by the sum of \$19,901.75.

But the 9th paragraph of that judgment of the Superior Court of Arizona allows Zeckendorf an attorney's fee of 10 per cent. upon said excess, and hence the amount specified for attorneys' fees under the 9th paragraph of the judgment is too large by at least the sum of \$1,990.17.

We shall presently see that the amount of the "additional attorney's fees" allowed to Zeckendorf under the 9th paragraph of the judgment of the Superior Court of Arizona has been increased to the extent of an additional \$4,036.31 by another curious device in the preparation of that judgment.

**Franklin Garnishment \$25,750 Principal,
\$14,613.11 Interest.**

The fourth paragraph of the Superior Court of Arizona, which is now here on appeal, deals with an item of \$25,750 in cash, which was disposed of by the judgment of the District Court of the Territory of Arizona and was *included* in the *second* cause of action, wherein judgment was given by that court in favor of Zeckendorf. That judgment of the District Court was affirmed in that particular on appeal by the Supreme Court of the Territory of Arizona, and its judgment in that particular was likewise *affirmed* by *this* court on the former appeal.

It is obvious that the Supreme Court of the Territory of Arizona did not possess any jurisdiction to change in any respect the judgment in relation to this item which had theretofore been entered by the District Court of the Territory of Arizona, because that judgment in that particular at least had become final and was *res adjudicata*.

It certainly cannot be contended for a single moment that the opinion and decision of this court on the former appeal or its mandate therein, can be interpreted as a direction and instruction or even a permission on the part of this court for the Superior Court of Arizona to *change* any part of the judgment of the District Court of Arizona, which was affirmed by this court on the former appeal. In order that the change which was made by the Superior Court of Arizona in respect

to this particular item may be the better understood, we shall briefly recite the facts in relation to it.

Prior to any difficulties between Zeckendorf and Steinfeld, Mr. Selim M. Franklin, who is now the attorney for the Receiver herein, brought an action against the Silver Bell Copper Company for the sum of \$51,500 or ten per cent. of the total sale price of the mines, which he claimed to be due him as attorney's fees for services performed by him in connection with the sale of the mines. He caused a writ of garnishment to be issued in that action which was served upon Steinfeld at a time when he concededly rightfully held that amount of money belonging to the Silver Bell Copper Company in his hands under and in pursuance of the contract of May 20, 1903. This was before any attempt had been made to either rescind or modify that contract.

Whether Steinfeld on January 16, 1904, did or did not wrongfully appropriate a certain note and certain money, it indisputably appears from the facts in this case, which were before this court on the former appeal, that he did *not* misappropriate or convert or make any claim to the ownership of, any part of that \$51,500 which was so garnisheed in his hands under the Franklin suit.

Although responsible to Franklin in the event that Franklin should recover the full amount claimed, Steinfeld was so confident that no such recovery was probable that he voluntarily turned over to the Silver Bell Copper Company one-half of the amount so garnisheed in his hands and retained only the remaining half, or to-wit, the sum of \$25,750 to protect himself against any judgment which Franklin might procure. Moreover, he voluntarily gave a bond to the Silver Bell Copper Company to secure the payment of this money.

It is alleged, in substance, in Zeckendorf's third amended complaint on which this case was tried, that the sum of \$51,500 had been garnisheed in the hands of Albert Steinfeld in a suit which was brought against the Silver Bell Copper Company by S. M. Franklin to recover that amount for attorney's fees, and that on January 16, 1904, Steinfeld entered into an agreement with the Silver Bell Copper Company whereby he surrendered to that corporation one-half of said amount or, to-wit: \$25,750 of the money which had been so

garnisheed in his hands, and by which he agreed to retain the remaining \$25,750 in his hands, as such garnishee, for the payment of any judgment that might be secured by said Franklin and that Steinfeld thereupon converted the same to his own use and benefit (See Transcript, pages 261 and 262).

It may be proper to add that the original complaint charges that S. M. Franklin had brought said suit and garnishment proceedings against the Silver Bell Copper Company at the instigation of and in collusion with Albert Steinfeld.

In their answer to Zeckendorf's complaint, the defendants (including Steinfeld) denied that Steinfeld claimed to be the owner of the aforesaid sum of \$25,750, which was so garnisheed in his hands, and denied that Steinfeld converted the same, or any part thereof, to his own use or benefit (Tr.).

The District Court made the following findings of fact in relation to this issue, and they were adopted verbatim and certified to this court by the Supreme Court of the Territory of Arizona on the former appeal, to-wit:

"XXIV."

"That after the 21st day of May, 1903, and some time in the month of May or June, 1903, S. M. Franklin, claiming to be a creditor of the said Silver Bell Copper Company, brought an action against the said Silver Bell Copper Company for the sum of \$51,500, and in said action garnisheed the sum of \$51,500, as the property of the Silver Bell Copper Company, then in the hands of said Albert Steinfeld. The said action is entitled 'S. M. Franklin, Plaintiff, v. Silver Bell Copper Company, Defendant,' and was brought in this court. That after said garnishment was levied on said Albert Steinfeld, and some time in the month of *January, 1904*, said Albert Steinfeld, paid back to the Silver Bell Copper Company \$25,750 of said \$51,500, in his hands retaining the other \$25,750 as security against the said *garnishment under an agreement* with the said Silver Bell Copper Company that he would hold and retain \$25,750 in his hands *as such security* against said garnishment, and that after paying to said S. M.

Franklin any moneys that might be recovered, or for which he might get judgment in said action, he would pay to the Silver Bell Copper Company the *balance* of \$25,750 so left in his hands as security after deducting the money so paid to him, said S. M. Franklin.

"The said Albert Steinfeld thereafter continued to hold and at the time of commencement of this action still held said sum of \$25,750 as such security, the same being the property of the Silver Bell Copper Company" (Tr., pp. 324 and 325).

"XXXVI."

"That thereupon said J. N. Curtis, being then the treasurer of said Silver Bell Copper Company and as such having in his possession the cash and under his control the notes of said company above mentioned, and under no other authority or claimed authority than as heretofore set out, paid to the said Albert Steinfeld of the funds held by him as treasurer of the said Silver Bell Copper Company then in his, Curtis', hands as such treasurer, the sum of \$145,743.75 in cash (the same being one-half of the sum of \$319,487.50, less the sum of \$28,000) and thereupon delivered to said Albert Steinfeld one of said two promissory notes, and which said funds and notes said Albert Steinfeld received from said Curtis, the treasurer of said Silver Bell Copper Company, and thereupon said Steinfeld appropriated said moneys so received and said note to his own individual use and not to the use or benefit of any other person or corporation whatsoever.

"That the said note so delivered to said Albert Steinfeld at the time of said delivery was worth the full amount of the principal and interest thereof, viz.: \$100,000.00 with interest thereon from the 20th day of May, 1903, to the 20th day of January, 1904, at the rate of six per cent. per annum, and said Steinfeld collected said full sum thereon and retained the same to his own use.

"That said Steinfeld also retained the sum of \$25,750, the funds of said corporation garnished by

S. M. Franklin, and which still remained in his hands as treasurer aforesaid, and which with said sum of \$145,743.75 in cash, so paid to him by said J. N. Curtis as the treasurer of said company, made a total sum of \$171,493.75 in cash.

" That said Albert Steinfeld collected on said note so delivered to him prior to the commencement of this action the sum of \$103,967.00, which with said sum of \$145,743.75, made a total of \$249,710.75, which said Albert Steinfeld so received from said defendant corporation, and all of which *said sum* before the commencement of this action said Albert Steinfeld took as his own property, to his own use, and said Albert Steinfeld thereafter kept the same as his own property and not as the property of any other person, firm or corporation, and not for the use or benefit of any other person, firm or corporation, and that no part of said sum has been paid back to said Silver Bell Copper Company " (Tr., 341-2).

It should be noted that the sum of \$249,710.75 which was received and taken by Steinfeld for his own use, does *not* include the \$25,750 garnishment item.

" XLII."

" That Selim M. Franklin at all the times herein mentioned was an attorney-at-law in active practice in the City of Tucson, and that during all of the said times and prior to the month of June, 1903, he was the attorney for the said company and the said L. Zeckendorf & Company and the said Albert Steinfeld, and at no time was under the domination or influence of said Steinfeld so as to do anything in any of the transactions involved in this litigation to the advantage of said Steinfeld and against the interest of said company or the said Zeckendorf " (Tr., p. 344).

The judgment of the district court, which was rendered on July 30, 1908, covers this issue in the following language :

" It is further ordered, adjudged and decreed That Albert Steinfeld holds the sum of \$25,750 money of

said Silver Bell Copper Company, in his hands as and for security to him against any liability on account of the garnishment levied on him in the action of Franklin v. Silver Bell Copper Company, said Steinfeld to account to said corporation or to the receiver of said corporation hereafter appointed for said sum immediately upon the final determination and settlement of this action, and to pay the said Silver Bell Copper Company or to such receiver the balance of said sum, if any, after deducting therefrom such sums, if any, that said Steinfeld may properly and in accordance with law pay or have paid for the benefit of the said Silver Bell Copper Company" (Tr., p. 346).

The Supreme Court of the Territory affirmed the judgment of the district court *in toto* (including, of course, the foregoing quoted portion thereof).

In its opinion on the former appeal, this Court, in referring to the judgment of the district court, said :

" The court further ordered that Steinfeld should hold in his hands the sum of \$25,750 to secure him against any liability as garnishee in a case by one Franklin against the Silver Bell Copper Company, Steinfeld to account to the Company for the money on the final determination of the action. An appeal was taken to the Supreme Court of the Territory of Arizona, and that court affirmed the judgment and orders of the district court " (12 Ariz., 245, 100 Pac., 784).

Moreover, this court did not in any way criticise that part of the judgment of the Supreme Court of the Territory of Arizona, which affirmed the orders, and this particular order, of the district court. Indeed, the only part of the judgment of the Supreme Court of the Territory of Arizona which was criticised at all by this court is epitomized in the following language, in the opinion on the former appeal to this court, to wit:

" For the reasons stated, we are of the opinion that the Supreme Court of Arizona erred in affirming so much of the judgment as dismissed the first cause of action."

Referring to that part of that judgment of the district court of Arizona, we find that it reads in part as follows—to wit:

“ Wherefore, by virtue of the law and the premises aforesaid, it is hereby ordered, adjudged and decreed:

“ FIRST: That the plaintiff recover nothing upon the first cause of action in the complaint set forth, and as to the said first cause of action, the defendants go hence without day ” (Tr., 345).

On his appeal from the judgment of the district court to the Supreme Court of the Territory of Arizona, and thence to this court, the plaintiff Zeckendorf purposely omitted to assign as error that part of the judgment of the district court which orders Steinfeld to hold said sum of \$25,750 of the money of the Silver Bell Copper Company which was garnisheed in his hands in the Franklin suit as and for security to him against any liability on account of the garnishment levied on him, and to account to said corporation, or to the receiver thereof, and to pay the said Silver Bell Copper Company, or to such receiver, “ the balance of said sum, if any, after deducting therefrom such sums, if any, that said Steinfeld may properly and in accordance with law pay or have paid for the benefit of the said Silver Bell Copper Company.”

See Tr., 346-349, Assignments of Error by Zeckendorf on appeal to Supreme Court of Territory.

Notwithstanding the premises, however, the attorneys for Zeckendorf presented to the superior court of the State of Arizona, and procured to be entered by said court, over the objections and exceptions of Steinfeld, the appellant herein, a judgment which reads in part as follows:

“ FOURTH. That the said Albert Steinfeld upon the first cause of action in said complaint set forth, pay to the said Hiram W. Fenner, receiver of the said Silver Bell Copper Company, as said receiver, for and on behalf of, and as the property of, the said Silver Bell Copper Company, the further sum of Twenty-five Thousand, Seven Hundred Fifty Dollars, together with interest thereon from January 16, 1904, to date, viz.:

July 1, 1913, at six (6) per cent per annum; amounting to the sum of Fourteen Thousand, Six Hundred and Thirteen dollars and Eleven cents, said principal and interest amounting, all told, this 1st day of March, 1913, to Forty Thousand, Three Hundred and Sixty-three Dollars and eleven cents; and that the Silver Bell Copper Company do have judgment against the said Albert Steinfeld for the said sum of Forty Thousand Three Hundred and Sixty-three Dollars and eleven cents, with interest from date till paid, at six (6) per cent. per annum, but that execution therefor do not issue till as hereinafter ordered. That the said Albert Steinfeld render an account of all moneys legally and lawfully paid out by him by reason of a garnishment served upon him in the case of S. M. Franklin, plaintiff, v. Silver Bell Copper Company described and referred to in findings twenty-nine and thirty-five herein, that in such account the said Steinfeld be allowed interest at the rate of six (6) per cent. per annum upon the said sum from January 16, 1904, till the date of judgment or settlement of the said garnishment proceedings; and that he further be allowed interest at the rate of six (6) per cent. per annum from the date of the said judgment or settlement of the said garnishment proceedings to the date of the allowance of his said accounting on such sum if any as was paid out by him and allowed by the court by reason of such garnishment proceedings. That execution thereupon issue against the said Albert Steinfeld and his property for such balance if any of said sum of Forty Thousand Three Hundred Sixty-three Dollars and Eleven cents as upon said accounting is found due by said Steinfeld to said Silver Bell Copper Company " (Tr., pp. 98-9).

Steinfeld objected and excepted to the rendition and entry of the foregoing part of said judgment against him, as error, upon the ground that the judgment and order theretofore rendered by the district court on July 30, 1908, on said issue, and filed and entered on October 2, 1908, had been affirmed by both the Supreme Court of the Territory and

the Supreme Court of the United States, and upon the further ground that the whole of said sum of \$25,750 so garnisheed in his hands had theretofore been paid out by him for the use and benefit of the Silver Bell Copper Company ; and, in opposition to the entry of that part of said judgment from which this appeal is now being prosecuted, Steinfeld offered to prove this fact to the superior court of the State of Arizona, as more particularly appears by the following proceedings, to-wit :

"MR. HENEY : I don't want to argue the question if your Honor has a conviction in regard to it as to what the law is.

Now in the second judgment it winds up as follows. This is Judge CAMPBELL's judgment in the second trial. 'It is further ordered, adjudged and decreed that Albert Steinfeld holds the sum of \$25,750, money of said Silver Bell Copper Company, in his hands and as and for security to him against any liability on account of a garnishment levied upon him in the action of Franklin vs. Silver Bell Copper Company ; said Steinfeld to account to said corporation or to the receiver of said corporation hereafter appointed for said sum immediately upon the final determination and settlement of this action.'

Has your Honor any evidence before you that that action has been settled ? Has your Honor any date to fix at which the interest shall start to run ? Has your Honor any evidence before you as to how much money was actually paid out on that judgment and when it was paid out. Clearly, up to the time it was paid out and that he had something in his hands to turn over and which the law required him to turn over, no interest could run. And here he is asked to turn \$14,000 of interest in addition to the principal sum of \$25,000 over, when it is a known fact that he did pay something out and under it to Mr. Franklin.

Now, the fact is that he has paid out all of that \$25,750, and we are ready to prove it. We will put Mr. Steinfeld on and show where every dollar of it went, and that every dollar of it went properly—first,

for attorney's fees in the Franklin suit; secondly, as a judgment to Franklin; thirdly, a compromise judgment, to which Louis Zeckendorf consented to the payment of \$5,000 of it over to Mr. Burnett, and, fourthly, as attorney's fees in the Burnett suit. That there has never been any dispute about it at all, and here is Mr. Steinfeld present, and we offer to put him on the stand at present to prove that the entire \$25,750 was paid out on the part of the Silver Bell Copper Company by him, with the exception of what was paid to Burnett in the Burnett suit against the Silver Bell Copper Company for a commission, and that suit was compromised for the sum of \$5,000, with the consent of Mr. Louis Zeckendorf, and the money was paid out.

"MR. STEINFELD, will you take the witness stand and be sworn on that.

"MR. MESERVE: Your Honor, we don't understand that any evidence can be offered at this time.

"THE COURT: Do you object to it?

"MR. MESERVE: Yes, we do.

"THE COURT: Objection sustained.

"MR. HENY: We save an exception" (Tr., p. 143).

It has been, and may be, argued that Albert Steinfeld has not been injured by the change which has been made in the form of that part of the judgment which relates to said sum of \$25,750, which was garnisheed in the Franklin case, because no execution can issue until a balance has been struck upon an accounting between Steinfeld and the receiver for moneys paid out by him which may thereafter be allowed by the court as having been properly paid by reason of such garnishment proceedings. But a careful examination of the judgment and order of the district court, as affirmed by this court on that issue, discloses the fact that Steinfeld was to be permitted to deduct from the money so in his hands, not only all money properly paid out by him under the Franklin garnishment proceedings, but in addition thereto, any other money which may have been properly and in accordance with law paid out by him for the benefit of the said Silver Bell Copper Company. It appears and must be presumed from the record now before this court

that prior to the entry of the judgment herein which is complained of by Steinfeld, he had paid out the whole of that particular fund consisting of \$25,750 partly in the Franklin suit and partly in another suit against the Silver Bell Copper Company which had been brought by a Mr. Burnett to recover a commission, and that the latter payment was made with the express consent of Louis Zeckendorf, as well as by authority of the Silver Bell Copper Company.

But the reason for the change in that part of the judgment of the district court is obvious the moment we examine paragraphs "Eighth" and "Ninth" of the judgment which is now here on appeal. These paragraphs read as follows:

"EIGHTH. That plaintiff out of said money recovered, and to be recovered by said Silver Bell Copper Company, from said Albert Steinfeld, do have and recover of and from said Silver Bell Copper Company and the receiver of said company; and the receiver of said company is hereby authorized and directed to pay to said plaintiff, as and for attorneys' fees to Honorables E. A. Meserve and Frank H. Hereford, for the bringing of this action, and the prosecution of the same *insofar as relates to said second cause of action*, up to and including the entry of the judgment of July 30, 1908, the sum of Two Thousand, Six Hundred Fifty-two Dollars and fifty cents, together with interest thereon from the said 30th day of July, 1908, till paid, at the rate of six (6) per cent. per annum.

NINTH. That plaintiff out of the said moneys recovered and to be recovered by Silver Bell Copper Company, from the said Albert Steinfeld, do have and recover of and from the said Silver Bell Copper Company, and the receiver of the said Silver Bell Copper Company is hereby authorized and directed to pay to plaintiff as additional attorney's fees for said Honorables E. A. Meserve and Frank H. Hereford, for bringing this action, and the prosecution of same up to and including the entry of this judgment, the sum of Forty Thousand One Hundred and Twenty-five Dollars and Thirteen cents, with interest thereon from date till paid, at the rate of six (6) per cent. per annum" (Tr., p. 100).

Let us return for a moment to the judgment which was rendered by the district court on July 30, 1908, and we find that the following is all that it has to say on the subject of attorneys' fees, to-wit :

"FOURTH. That plaintiff, out of the said money recovered and to be recovered by said Silver Bell Copper Company from the said Albert Steinfeld, do have and recover of and from the said Silver Bell Copper Company, and be paid by the said Silver Bell Copper Company the sum of \$2,652.50 as and for attorney's fees for the bringing of this action and the prosecution of the same up to and including the entry of this judgment ; and it is further ordered that the receiver hereafter to be appointed herein and hereafter named, do pay to said plaintiff the said sum of \$2,652.50 out of the said moneys to be recovered by said Silver Bell Copper Company from the said Albert Steinfeld " (Tr., p. 355).

As the district court decreed in this same judgment " that the plaintiff (Zeckendorf) recover nothing upon the first cause of action in the complaint set forth," it is apparent that it did not allow or intend to allow attorney's fees upon the theory or ground that the Silver Bell Copper Company had been benefited by the suit which Zeckendorf had brought as a stockholder in so far as those items are concerned as to which it was adjudged that the plaintiff recover nothing ; but it is equally apparent that the district court did include in its judgment for \$2,652.50 as and for attorneys' fees to Zeckendorf, all services performed by his attorneys for the benefit of the Silver Bell Copper Company in so far as they relate to said item of \$25,750 which was garnisheed in the hands of Steinfeld under the Franklin suit against the Silver Bell Copper Company, because the district court specifically disposed of that particular matter in this same judgment. It will be seen that the sum of \$2,652.50 was decreed to Zeckendorf by that judgment of the district court " as and for attorneys, fees for the bringing of this action and the prosecution of the same up to and including the entry of this judgment."

In other words, the judgment of the district court plainly

decreed that the total amount to be paid to Zeckendorf for attorneys' fees by the receiver should be the sum of \$2,652.50, and that this amount should cover the entire services of such attorneys for the bringing of this action and the prosecution of the same up to and including the entry of this judgment—which judgment fully disposes of the issue raised by the allegations of the complaint in regard to said item of \$25,750 which was garnisheed in the Franklin case.

Returning to the judgment which was entered by the superior court of the State of Arizona, and which is now before this court for consideration, we find that the eighth paragraph thereof makes a radical change in the judgment of the district court, which had been affirmed both by the Supreme Court of the Territory of Arizona and by this court in that particular, and it provides that said sum of \$2,652.50 shall be paid by the receiver to Zeckendorf "as and for attorneys' fees for the bringing of this action and the prosecution of the same *in so far as relates to said second cause of action*, up to and including the entry of the judgment of July 30, 1908" (The italics are ours). Whence comes the provision "*in so far as relates to said second cause of action?*" We shall hunt in vain for it in that part of the judgment of the district court which relates to the question of attorneys' fees. It is entirely new and was deliberately inserted for a purpose which is easily discovered, and it was done upon the theory that the item of \$25,700 garnishment money could be treated as exclusively a part of the First cause of action, but, unfortunately for appellee, however, the allegations in regard to this item of \$25,750 are repeated verbatim in the *Second* cause of action (See Tr., page 265 and pages 258 to 262).

The ninth paragraph of the judgment now before this court provides that Zeckendorf shall receive as and for "additional attorneys' fees for bringing this action and the prosecution of the same up to and including the entry of this judgment, the sum of \$40,125.13, with interest thereon from date until paid at the rate of 6% per annum." This amount was obtained by taking 10 per cent. of all of the several amounts, including interest, which this judgment decrees shall be paid by Steinfeld to the receiver of the Silver Bell Copper Company. The aggregate amount upon which this 10 per cent. is figured includes the sum of \$40,363.11, for

which judgment is rendered against Steinfeld by the fourth paragraph of said judgment, and which is made up of said item of \$25,750 so garnisheed in Steinfeld's hands under the Franklin suit, together with interest thereon from January 16, 1904, to July 1, 1913, the date of the entry of said judgment by the superior court of the state of Arizona, amounting to \$14,613.11 more.

Additional Attorney's Fees of 10 Per Cent. or \$6,026.48, on Aggregate Sum of \$60,264.86, Made Up of Francis and Volkert Item of \$12,700 Principal with \$7,201.75 Interest, or Total of \$19,901.75, and Franklin Garnishment Item of \$25,750 Principal with \$14,613.11 Interest or Total \$40,363.11.

We have already discussed the additional attorney's fee of \$1,990.17 allowed on the erroneous \$19,901.75 Francis and Volkert item.

It is manifest that by this change in the judgment of the District Court, as affirmed, which gives judgment against Steinfeld in an additional amount of \$40,363.11, on the Franklin Garnishment item, that the amount allowed to Zeckendorf as additional attorney's fees by the ninth paragraph of the judgment of the Superior Court is increased to the extent of \$4,036.31, and this notwithstanding the fact that the Silver Bell Copper Company had no cause of action against Steinfeld on that particular item at the time of the commencement of the action or ever or at all, as has been adjudged, and notwithstanding the further fact that said part of the judgment of the District Court which decreed and fixed the amount of compensation which Zeckendorf was to receive as and for attorney's fees for the services performed by his attorney in relation to this particular item, as well as for their services in relation to the second cause of action, is for the sum of \$2,652.50, and no more.

In other words, the judgment now on appeal allows Zeckendorf \$6,688.81 for attorney's fees on the second cause of action.

It may seem to be a very simple matter for the Superior

Court to arbitrarily allow \$4,036.31 additional attorney's fees to Zeckendorf for services in connection with an item about which there was never any dispute between Steinfeld and the Silver Bell Copper Company, and as to which it could easily have been shown that nothing whatever was recovered or could be recovered for the benefit of the Silver Bell Copper Company. The injustice of such a proceeding, aside from the fact that it is not authorized by the decision of this Court, is too manifest to call for argument.

It may be argued that the District Court of Arizona committed error in its judgment as entered and affirmed by authorizing Steinfeld to deduct from said sum of \$25,750, so garnisheed in his hands, not only any sums which he might pay out in connection with or under a judgment in the Franklin suit, but also to deduct therefrom any and all sums

"that said Steinfeld may properly and in accordance with law pay or have paid for the benefit of the said Silver Bell Copper Company."

The only answer which it is necessary to suggest is that no appeal was taken by Zeckendorf from that part of said judgment of the District Court and the same was not assigned as error.

Moreover, in the proposition which Steinfeld made to the Silver Bell Copper Company on May 20, 1903, and which was accepted by that corporation, he stipulated among other things that the Silver Bell Copper Company shall also

"keep him free and harmless from any and all expenses and loss which may arise by reason of any claim or asserted claim of any person whatsoever for or on account of or arising out of, or connected with the present sale and negotiations or any past negotiation or transaction in regard to said mining claims, or any of them. And particularly that this company shall assume and pay unto N. O. Murphy the commissions which he, said Steinfeld, agreed to pay to said Murphy, to wit, the sum of \$25,000, said agreement being made for and on behalf of this company, and also shall keep him harmless from loss, damage, or expense by reason of the asserted claim of one J. M. Burnett for commission."

It seems, therefore, that as a part of the consideration for that part of the contract of May 20, 1903, which Zeckendorf claims has not been rescinded, and which vested the title to all of the proceeds of the sale of the two groups of mines in the Silver Bell Copper Company, that corporation was bound to reimburse Steinfeld for any and all expenses incurred by him in the suit of Burnett against the Silver Bell Copper Company for a commission, and consequently the judgment and order of the District Court in relation to the aforesaid item of \$25,700, which was garnisheed in his hands under the Franklin suit, to the effect that Steinfeld should account to the Receiver only for

" the balance of said sum, if any, after deducting therefrom such sums, if any, that said Steinfeld might properly, and in accordance with law pay, or have paid, for the benefit of the said Silver Bell Copper Company "

was not erroneous, and the Superior Court should have permitted Steinfeld to prove that the whole of said item of \$25,750 had been properly expended by him for the benefit of the Silver Bell Copper Company in connection with the Franklin suit and in connection with the suit for commission by Burnett. This is particularly true in view of the further fact that Steinfeld then and there offered to prove that Zeckendorf agreed and consented to this disposition of the money.

The crowning error of the Superior Court was in allowing Zeckendorf 10 per cent. as attorney's fees upon all moneys so expended by Steinfeld in settlement of the Franklin judgment and in the compromise of the Burnett suit as well as in allowing them 10 per cent. upon interest on the whole of said \$25,750 from January 16, 1904, until the date of the entry of judgment by the Superior Court on July 1, 1913, amounting to the enormous additional sum of \$14,613.11.

This court has affirmed the judgment " that at the time of the commencement of this action Steinfeld was rightfully holding such \$25,750."

It was not, therefore, properly recoverable in this action and certainly was not included in the mandate of this court.

It is not found that it or any of it was in his hands at the

time of the judgment. It is expressly excluded in the Finding from the amount which he retained as his own or for his own use and benefit.

The Allowance of Interest.

The item of interest upon such sum from January 16, 1904, to the date of the judgment, amounting to \$14,613.11 is wholly undue. The Arizona statute with respect to interest is as follows :

" In the absence of an agreement in writing signed by the debtor, interest shall be paid at the rate of six per cent. per annum on money due on any bond, bill, promissory note or other instrument in writing, on judgments, on money lent, on the sum due on accounts stated, on the sum due from the time it is audited, from the territory, and county, city or village " (Rev. Stat., 1901, Par. 2774).

It is not, therefore, chargeable as interest proper. Nor can it be recovered as damages for wrongful detention, because there is no finding that he wrongfully detained it. On the contrary it is the finding that he had the right, at least until the termination of the Franklin action, to detain it and there is no finding as to when or how the Franklin action terminated or whether it is not still pending. The District Court specifically allowed interest on the other items in its judgment on the second cause of action, and hence, it must be presumed that it purposely omitted to allow interest on this item of \$25,750. The Supreme Court of the territory of Arizona affirmed that part of the judgment of the District Court without mentioning interest, and so did this court. Hence the Superior Court of Arizona had no authority to allow interest upon this particular item in any event.

In re Washington & G. R. Co., 140 U. S., 92.
Himely v. Rose, 5 Cranch, 312.

This Court said :

" We are of opinion that the writ of mandamus prayed for must be granted, *irrespective* of the ques-

tion largely discussed at the bar and considered in the opinion of the general term, *as to whether a judgment founded on tort bears or ought to bear interest*, in the Supreme Court of the District, from the date of its rendition.

Upon the hearing on the writ of error, which resulted in the judgment and mandate of this court, *the question of the allowance of interest on the judgment from its date until it should be paid was a question for the consideration of this court.* The fact that the judgment of this court merely affirmed the judgment of the general term with costs, and said nothing about interest, is to be taken as a declaration of this court that, *upon the record as presented to it*, no interest was to be allowed. It was thereupon the duty of the general term to enter a judgment *strictly in accordance with the judgment of this court*, and *not to add to it the allowance of interest.*

The judgment of the general term of June 28, 1886, made no allowance of interest, nor did the judgment of the special term of December 18, 1885. Those were the judgments which were affirmed by this court, *and it affirmed them as not providing for any interest; and this court did not itself award any interest.* The command of the mandate of this court, 'that such execution and proceedings be had in said cause as, according to right and justice and the laws of the United States, ought to be had, the said writ of error notwithstanding,' did *not* authorize the general term of the Supreme Court of the District *to depart in any respect from the judgment of this court.* Under these circumstances, the general term had no authority, to make its order of June 9, 1890, in regard to interest on the judgment."

Another Flagrant Error in the Judgment is that of Additional Attorneys' Fees \$40,125.13.

The ninth paragraph of the judgment of the Superior Court, which is now here on appeal, allows the "additional" sum of \$40,125.13, with interest thereon from date until paid,

at the rate of 6 per cent. annum to Zeckendorf as and for attorneys' fees.

When this provision is read in connection with the eighth paragraph of said judgment, it is obvious that this large additional sum for attorneys' fees was allowed by the Superior Court for the services performed by the attorneys in connection with the first cause of action prior to July 30, 1908, the date on which the judgment of the District Court was rendered, as well as for their services in connection with both causes of action from that date until the date of the entry of the judgment by the Superior Court, which is here now on appeal.

But we have already seen that the judgment of the District Court, which was rendered on July 30, 1908, allowed the sum of \$2,652.50

"as and for attorneys' fees for the bringing of this action and the prosecution of the same up to and including the entry of this judgment."

and that this included their services up to the date of that judgment in the matter of the item of \$25,750 which was garnisheed in Steinfeld's hands under the Franklin suit.

The total amount allowed to Zeckendorf as attorneys' fees up to July 1, 1913, under the judgment of the Superior Court which is now here on appeal, is the sum of \$43,573.38.

The total amount of money and notes turned over to Steinfeld by Curtis on January 16, 1904, including interest accumulated on the note to that date was \$249,743.75, but Steinfeld also received the sum of \$33,300 additional as dividends on the 300 shares of Nielsen's stock, thus making an aggregate amount of \$283,043.75, which it is alleged was improperly received by him. From this amount, however, it must be admitted that there should be deducted the following sums, to wit: \$10,000 which he paid to Nielsen's, January 24, 1904; \$12,700 which he paid to Francis M. Volkert, January 9, 1904, and \$18,117 which he was entitled to receive on account of expenses incurred by him in acquiring title to the English group of mines. These three items aggregate the sum of \$40,817, and if we deduct this aggregate

amount from the \$283,043.75 which he received, it is at once apparent that under the allegations of the complaint, the total amount which Steinfeld is alleged to have converted is the sum of \$242,226.75. Louis Zeckendorf owned 250 shares of the stock of the Silver Bell Copper Company and the total number of shares then outstanding was 700, divided as follows: Albert Steinfeld 249 shares; Steinfeld, trustee, 30 shares; Shelton, as a gift from Steinfeld, 1 share; Curtis, in payment for expert mining services, 170 shares. Hence it is obvious that the proportion of said total amount of \$242,226.75 which might be received as dividends by Louis Zeckendorf is $\frac{250}{700}$ or $\frac{5}{14}$ ths thereof. In round numbers, this would amount to about $\frac{1}{3}$ of \$242,226.75, or about \$80,000. This was the original amount in controversy between Zeckendorf and Steinfeld, and justice between the parties could best have been done by treating the corporation as a mere agency. Under the theory upon which this case has been decided by the Arizona Courts, the attorneys' fees now amount to more than 50 per cent. of the entire amount which was originally in controversy between the parties.

Attorneys' fees are not ordinarily allowed to the plaintiff in a suit in equity, even when flagrant fraud rather than mutual mistake is the gist of the action. Courts of equity do not allow attorneys' fees as a penalty to punish the defendant for his civil wrongdoing. Attorneys' fees are usually allowed in a so-called stockholders' suit upon the theory that the complaining stockholder has brought the action for the benefit of the corporation, i. e., for the benefit of a large number of other stockholders who are similarly situated and who have thus been similarly injured; but in the case at bar it cannot be said that Louis Zeckendorf brought suit for the benefit of any other stockholders, because there were none who were similarly situated or similarly injured. All of the other stockholders, to wit, Steinfeld, Shelton and Curtis, were made defendants in this suit, and it was alleged in Zeckendorf's complaint that they joined with Steinfeld in all of the alleged wrongdoing. Steinfeld and Curtis were in reality the only other stockholders. The testimony shows that Steinfeld acquired the individual ownership of the 30 shares of stock which were standing in his name as trustee, immediately after the commencement of

the action, but that is of no consequence, as he was liable to his *cestui que* trust in any event, and that stock always stood in his own name, anyhow.

At the time the transactions occurred which are complained of by Zeckendorf the corporation had disposed of all of its property, and had paid all of its debts, and had concluded the purpose of its organization, and was ready for dissolution just as soon as its funds should be distributed to its stockholders in the way of dividends.

Under the circumstances, the reason for the rule fails, and Zeckendorf was not entitled to recover attorneys' fees. Steinfeld did not appeal, however, from the judgment of the District Court allowing \$2,652.50 to Zeckendorf as attorneys' fees, as and for their services up to the date of the entry of that judgment; and the Silver Bell Copper Company did not appeal from that part of the judgment of the District Court.

We are not now contending, however, that no attorneys' fees should be allowed to Zeckendorf in addition to those already allowed on the second cause of action, if he recovers a judgment on behalf of the Silver Bell Copper Company against Steinfeld on the first cause of action, but we do most earnestly contend that the foregoing circumstances should be taken into consideration in fixing the amount of such attorneys' fees, and that the amount which was allowed by the Superior Court in the judgment which is now here on appeal is grossly excessive. The attorneys for Steinfeld objected specially to the entry of that part of the judgment by the Superior Court, and offered to call expert witnesses to testify as to the value of the services which had been performed in the case by the attorneys for Zeckendorf in all matters not included in the judgment of the District Court, in the second cause of action which was affirmed.

The Superior Court overruled both the objections and the offer, and in doing so, among other things, said:

"THE COURT: While this Court is willing to exercise the power and authority and jurisdiction conferred upon it by the Constitution and laws of the State of Arizona, it does not believe that they give this court the authority to set itself above the

Supreme Court and to set aside a ruling made by the Supreme Court. And the Supreme Court has said on this proposition that the trial court did not exceed its authority, and that the trial court was reasonable in its judgment on the matter of attorneys' fees. I take it, therefore, that that would be binding on this court in this case" (Tr., p. 129).

The Supreme Court of the Territory had refused to disturb the action of the District Court in adjudging that \$2,652.50 was a proper amount for all services performed by Zeckendorf's attorneys up to the time of the entry of the judgment. Zeckendorf had assigned that action as error, and argued that the fee was too small.

And again :

"THE COURT: The answer, Mr. Pattee, possibly, to that is, that the matter appears to the court to have been passed upon by the trial court which has settled it for all times in a finding made by the trial court.

"MR. CURLEY: Which has been approved by the Supreme Court.

"THE COURT: And which has been approved by the Supreme Court of the territory and the Supreme Court of the United States to the effect that 10 per cent. was reasonable attorneys' fees on the amount allowed or on any amount to be allowed.

"MR. PATTEE: Well, I do not conceive, your honor, that the construction of that language would apply to the amount recovered. It was not to be supposed that the court in rendering judgment for the defendant should anticipate that some contingency might arise in which some other amount should be allowed. You may remember that the second cause of action involved an accounting. There was an accounting all the way through that, and it was in reference to that that the court used that language. The very idea that on the first trial the court finds that it is less than about half of 10 per cent., makes it appear obvious that the court never intended any such percentage as that. The same Judge that found on the

the first cause of action used that language as a matter of caution.

"THE COURT: I might say that it is obvious that the court did not intend it to apply to the first cause of action, because when it did find upon that, it found upon an entirely different ground.

* * * * *

"MR. CURLEY: Upon the second trial no specific allowance was made, but the court must have had in mind the possibility of the Supreme Court being in error by reason of the fact that the court in his original judgment—in its original judgment—differed from the Supreme Court of the territory as to what that judgment should be. As a matter of fact, the lower court, in its original judgment, gave judgment for practically the same results that your honor is giving judgment now and along practically the same line indicated by the Supreme Court of the United States. So that those things must necessarily have been taken into consideration, and the lower court evidently did take them into consideration. Now the court made this finding and the language is very suggestive:

" 'This action is prosecuted by the plaintiff above named as a stockholder of said defendant, the Silver Bell Copper Company * * * that 10 per cent of the amount for which judgment is finally given in this action is'—not only is, but 'will be a reasonable amount to be allowed plaintiff as a charge against said Silver Bell Copper Company as attorneys's fees for the bringing and prosecuting of this action for its benefit.'

"That finding was expressly adopted by the Supreme Court of the territory and stands as the law in this case to-day. It has never been changed. That is just as much so as the finding that Mr. Steinfeld holds for the Silver Bell Copper Company so much money. That is the situation. Proof was introduced by his attorneys. The Court heard the proof and decided the matter * * *

* * * * *

THE COURT : Judgment in this case will be entered for the plaintiff for attorneys' fees in the sum of 10 per cent of the amount recovered " (Tr., pp. 132 to 134 inclusive).

Mr. Curley was acting as attorney for Zeckendorf on the motion for judgment before the Superior Court and Mr. Pattee was acting as the attorney for Steinfeld in the matter. The finding of fact by the District Court, to which Mr. Curley referred, and which was certified to this Court by the Supreme Court of the territory on the former Appeal, reads as follows :

" XXXIX. That this action is prosecuted by the plaintiff above named as a stockholder of the said defendant, the Silver Bell Copper Company, and not otherwise, and that all of the sums of money expended by him as and for costs and attorneys' fees in the prosecution of this action are expended for the benefit of the said Silver Bell Copper Company and not for the benefit of this plaintiff, except as he is a stockholder of said corporation ; that this plaintiff in that regard has employed as attorneys for the bringing of this action for the benefit of the Silver Bell Copper Company Edwin A. Meserve of Los Angeles, California, and Frank H. Hereford of Tucson, Arizona, and has agreed to pay the said attorneys reasonable fees for the services rendered in this action, and which said fees and all other expenses and obligations incurred by this plaintiff in the bringing of this action should be paid the plaintiff or to those to whom he is obligated therefor, by the said defendant, Silver Bell Copper Company, out of the moneys which it may receive as the result of the bringing and prosecuting of this action ; that 10 per cent. of the amount for which judgment is finally given in this action is and will be a reasonable amount to be allowed plaintiff as a charge against said Silver Bell Copper Company as attorneys' fees for bringing and prosecuting this action for its benefit."

It must be kept in mind that the District Court had announced before signing the findings of fact of which the afore-

said was a part, that it would render judgment in favor of Steinfeld dismissing the first cause of action and against Steinfeld on the second cause of action only. Moreover, the judgment which was entered by the District Court upon said findings of fact contained the following provisions, to wit:

"FOURTH. That plaintiff out of the said money recovered and to be recovered by said Silver Bell Copper Company from the said Albert Steinfeld, do have and recover of and from the said Silver Bell Copper Company and be paid by the said Silver Bell Copper Company the sum of \$2652.50 as and for attorneys' fees for the bringing of this action and the prosecution of the same up to and including the entry of this judgment, and it is further ordered that the Receiver hereafter to be appointed herein and hereafter named do pay to said plaintiff the said sum of \$2652.50 out of the said moneys to be recovered by said Silver Bell Copper Company from the said Albert Steinfeld" (See Tr., 343).

"It is further ordered, adjudged and decreed that Albert Steinfeld holds the sum of \$25,750, money of said Silver Bell Copper Company, in his hands as and for security to him against any liability on account of a garnishment levied on him in the action of Franklin against the Silver Bell Copper Company, said Steinfeld to account to said corporation, or to the Receiver of said corporation hereafter appointed, for said sum, immediately upon the final determination and settlement of this action, and to pay the said Silver Bell Copper Company or to such Receiver, the balance of said sum, if any, after deducting therefrom such sums, if any, that said Steinfeld may properly and in accordance with law, pay or have paid for the benefit of the said Silver Bell Copper Company" (Tr., 345 and 346).

It certainly cannot be presumed that in adopting the aforesaid finding to the effect that

"ten per cent of the amount for which judgment is finally given in this action is and will be a reasonable

amount to be allowed plaintiff as a charge against said Silver Bell Copper Company as attorneys' fees for bringing and prosecuting this action for its benefit",

the Supreme Court of the Territory anticipated that this court might reverse its judgment, affirming the judgment of the District Court dismissing the first cause of action, and intended that in such event 10 per cent. of any amount which might finally be entered as a judgment against Steinfeld on the first cause of action would be a reasonable attorney's fee. Such a presumption is simply preposterous. Neither did the District Court intend any such thing. The District Court had in mind the fact that Steinfeld was required to pay to the Receiver any "balance" which might be left in his hands after he had settled the Franklin suit, and it was of the opinion that 10 per cent. of such "balance" would be a reasonable additional attorney's fee to be paid to the attorneys for Zeckendorf for their services in the accounting matter, after the entry of that part of the judgment. The \$2,652.50 was in full for their services in connection with that item also, up to the time of the entry of the original judgment. Undoubtedly the Supreme Court of the Territory so understood it also. And besides that the judgment on the second cause of action had not yet been "finally given in this action" at the time the findings of fact were prepared and signed; and interest was accumulating on the amount for which judgment was to be given and the Court intended that 10 per cent. upon such interest should also be allowed as attorney's fees. The judgment, as "finally given" by the District Court was for \$26,525.00 including both principal and interest, and the District Court gave judgment for exactly 10 per cent. thereof for attorney's fees.

Moreover, that part of the so-called finding of fact was purely a conclusion of law in so far as the contingency was concerned of a judgment against Steinfeld on the first cause of action.

The District Court did not at that time have any evidence before it upon which it could have made a finding of fact as to what would be a reasonable attorney's fee for services, the nature, character and extent of which could not possibly be then foreseen. Treating it as a conclusion of law it certainly did not become

"the law of the case" simply because it was adopted by the Supreme Court of the territory along with the other findings of the District Court, because it is the opinion and decision of *this Court only* which constitutes "the law of the case" in the present and in all future proceedings in the case at bar, and this Court has expressly so decided on the former appeal, and this court did not adopt or pass upon that particular conclusion of law, and obviously did not consider it at all.

On the first trial of the case the District Court in rendering judgment against Steinfeld on both causes of action and after having heard and considered a great deal of expert testimony in regard to the value of the services of the attorneys, rendered judgment allowing Zeckendorf \$15,000 as attorneys' fees on both causes of action. The total judgment against Steinfeld which was entered by the District Court at that time was for the sum of \$266,450.15 with interest thereon. Obviously the District Court did not think that 10 per cent. of the amount of the judgment was a reasonable attorney's fee at that time. The case had been resubmitted on the same evidence by stipulation of the parties and the additional work performed by the attorneys was not very great.

We particularly call the attention of this court to the case of *McMannomy v. Chicago D. & V. R. Co.*, 47 N. E., 713 (Supreme Court of Illinois, April 3, 1897). In the case just cited, the trial court allowed an attorney's fee of \$85,000 and the transactions involved more than two million dollars. The Appellate Court cut the fee to \$50,000 although the services which are enumerated in the opinion were enormous as compared with those of the attorneys for Mr. Zeckendorf in this case.

Unless this court intended by its opinion and decision on the former appeal to adopt the conclusion of law that 10 per cent. on any final judgment which might be entered against Steinfeld on the first cause of action in this case, is a reasonable attorney's fee, it is quite clear that the Superior Court erred in refusing to hear evidence as to the value of the services which had been performed by the attorneys for Zeckendorf.

Judge SUTTER who was conducting the proceeding admitted as we have seen, that it would take a great deal of research on his part in studying and reading over the record to be able to

dictate, himself, a proper form of judgment, and that for that, reason the court would rely largely upon the form submitted by counsel for the plaintiff, and that

"if they include anything in that form of judgment that should not be there, when it is brought to the attention of the Supreme Court of the United States, of course it will be stricken out, or an order made back to this court to correct it. Thereby they do not make anything. In fact, they lose if they are not careful enough to draw that judgment properly. It is for the benefit of the defendants if the judgment is not in the proper form."

It cannot be claimed with propriety that he possessed sufficient personal knowledge of the nature, character or extent of the services which had been performed by Zeckendorf's attorneys to enable him to justly fix the amount of their compensation without hearing any testimony on the subject.

Compound Interest on Judgment of Second Cause of Action.

The Territorial District Court of Arizona rendered judgment against Steinfeld on the second cause of action in part as follows :

"That the said Silver Bell Copper Company do have and recover from said Albert Steinfeld the sum of \$20,850, with interest thereon at the rate of 6 per cent. per annum from the 20th day of January, 1904; that plaintiff do have execution for the said sum of \$20,850 and interest thereon from said date against the said Albert Steinfeld, the recoveries on said execution to be paid to the defendant the Silver Bell Copper Company, or to the receiver of the said company to be appointed as in this judgment provided."

The Superior Court of Arizona has changed that judgment, which was affirmed by this court as it stood on the former appeal in this case, so as to give the Silver Bell Copper Company interest from and after July 30, 1908 (the date of that

District Court judgment), upon the interest which had accumulated on the principal sum for which the judgment was given from January 20, 1904, up to the date of that District Court judgment. It is freely conceded that the judgment of the District Court upon that part of the second cause of action should have been for the aggregate amount of the aforesaid principal sum, together with interest thereon up to July 30, 1908. The judgment as it was affirmed by this court on the former appeal does not read that way, however, and the Superior Court of Arizona has no power or authority to change it in any respect.

In re Washington & G. R. Co., 140 U. S., 92.

Motion to Dismiss Receiver.

The Supreme Court of Arizona erred in dismissing our appeal from the action of the Superior Court in refusing to exercise any discretion upon our motion to dismiss the receiver, because under the changed circumstances of the case that was a matter as to which it could and should have properly exercised its own judicial discretion, and on the facts as they appeared in the affidavits on which our motion was based it was an abuse of discretion for it to refuse to dismiss the receiver.

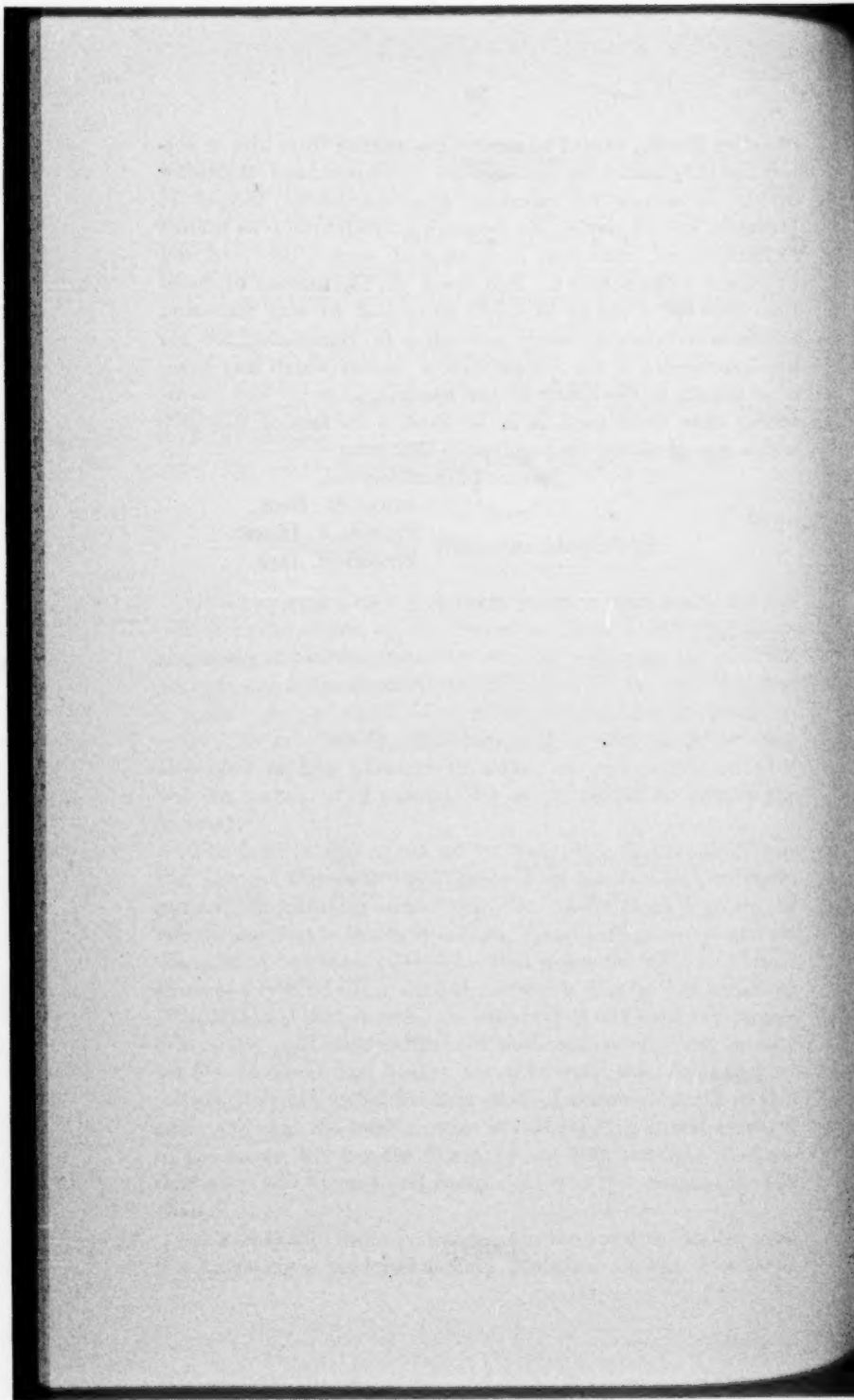
The facts as they appeared on the motion that are the Silver Bell Copper Company was organized for the sole and exclusive purpose of operating and selling the "Old Boot" group of mines, and that it has fully accomplished that purpose, and its dissolution has been adjudged; that it has no debts or obligations of any kind other than those which may be due to Albert Steinfeld, and that it owns no property of any kind except certain money paid into the hands of said receiver after our motion for his dismissal was denied, together with the claim against Albert Steinfeld under the first cause of action set forth in this suit; and that the total number of outstanding shares of stock of the Silver Bell Copper Company are 700, and that Zeckendorf owns 250 thereof and Steinfeld owns the remaining 450 thereof.

Consequently there is nothing for the receiver to do, even if a judgment is rendered against Steinfeld on the first cause

of action herein, except to receive the money from him or collect the judgment from him and his bondsmen, and thereafter divide the money by returning nine-fourteenths thereof to Steinfeld and by paying the remaining five-fourteenths thereof to Zeckendorf; after first deducting, of course, the fees and expenses of the receiver. The bond in the amount of more than \$860,000 given by Steinfeld on appeal to stay execution herein is certainly as ample protection to Zeckendorf for his five-fourteenths of the net amount of money which may hereafter remain in the hands of the receiver, after he and his attorney have been paid, as is the bond in the sum of \$100,000 which was given by the receiver in this case.

Respectfully submitted,

JAMES M. BECK,
FRANCIS J. HENRY,
EUGENE S. IVES.



12
No. 239

FILED
OCT 9 1915
JAMES D. MAHER

IN THE
Supreme Court
OF THE
United States

Albert Steinfeld, R. K. Shel-
ton, J. N. Curtis, Silver
Bell Copper Company and
Mammoth Copper Com-
pany, *Appellants,*

vs.

Louis Zeckendorf and
Hiram W. Fenner, Re-
ceiver,

Appellees.

BRIEF FOR HIRAM W. FENNER, RE-
CEIVER OF SILVER BELL COP-
PER COMPANY, A CORPORA-
TION, APPELLEE

EDWIN F. JONES,

Attorney for Hiram W. Fenner, Receiver of
Silver Bell Copper Company, appellee.

SELIM M. FRANKLIN,
Of Counsel.



LIST OF AUTHORITIES CITED

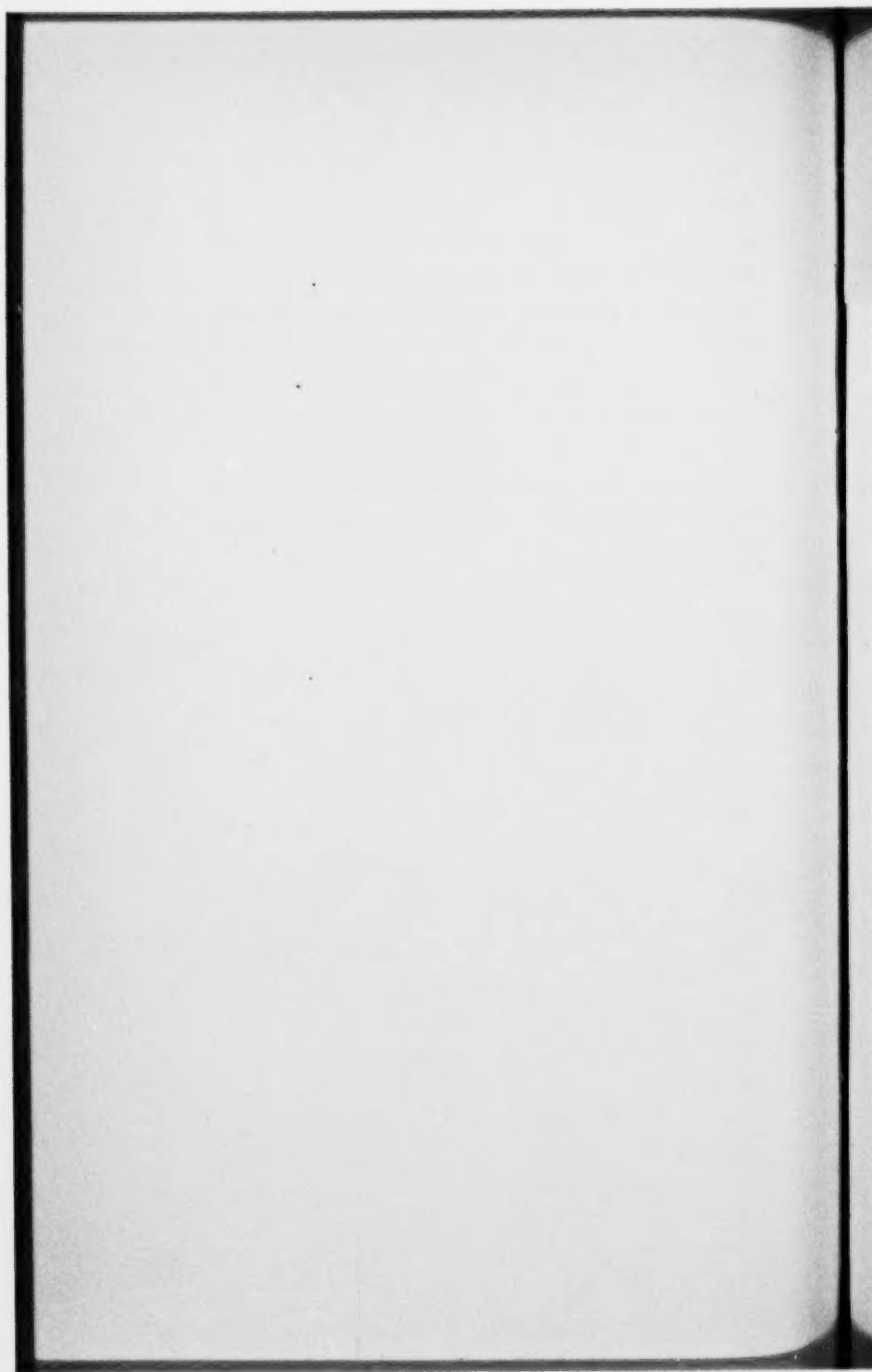
PAGES WHERE CITED

Arizona Statute on Interest, Sec. 2774, R. S. A. of 1901.....	37
Aspin M. & S. Co. vs. Billings, 150 U. S., 37...	7
Atlantic Nat. Bank vs. Harris, 118 Mass., 147.	35
Barr vs. Haseldon, 10 Rich. Eq. (S. C.), 53....	35
Bear Lake etc. vs. Garland, 164 U. S., 41.....	9
Brown vs. First Nat Bank, 113 Pac., 483; 49 Colo., 393.....	35
City Nat. Bank, In re, 153 U. S., 246.....	39
Cooper vs. Hill, 36 C. C. A., 402.....	29, 34
Cyc., Vol. 22, p. 1495.....	36
Dodge vs. Perkins, 9 Pick. (26 Mass.), 368....	35
Eagle M. & I. Co. vs. Hamilton, 218 U. S., 513..	9
Eilers vs. Bratman, 111 U. S., 356.....	9
Gaines vs. Caldwell, 148 U. S., 228.....	7
Gildersleeve vs. N. M. M. Co., 161 U. S., 303...	9
Greenly vs. Hopkins, 10 Wend., 96.....	35
Haley vs. Kilpatrick, 104 Fed. Rep., 147.....	14
Haws vs. Victoria Copper Co., 160 U. S., 303..	9
Humphrey vs. Baker, 103 U. S., 736.....	7
Idaho etc. Land Co. vs. Broadway, 123 U. S., 509.....	9
Kingsbury vs. Buckner, 134 U. S., 671.....	7
McKall Jr. vs. Richards, 116 U. S., 45.....	7
New Dunderberg M. Co. vs. Odd, 38 C. C. A., 8.	36
Potts, In re, 166 U. S., 258.....	14

PAGES WHERE CITED

Rapelis vs. Emory, 1 Dallas, 349.....	36
Republic of Columbia, ex parte, 195 U. S., 604.	39
Sanford Fork & Tool Co., In re, 160 U. S., 247.	14
Stewart vs. Barnes, 153 U. S., 456.....	34, 37
Stewart vs. Salamon, 97 U. S., 361.....	7
U. S. vs. New York Indians, 173 U. S., 464....	7
U. S. vs. North Carolina, 136 U. S., 211.....	33
Zeckendorf vs. Johnson, 123 U. S., 617.....	9
Zeckendorf vs. Steinfeld, 225 U. S., 445-459....	3, 6, 15, 43





By mistake of the printer the "Subject Index," and "List of Authorities cited," is appended at the end of this Brief.

OF THE
United States

Albert Steinfeld, R. K. Shel-
ton, J. N. Curtis, Silver
Bell Copper Company and
Mammoth Copper Com-
pany, *Appellants,*

vs.

Louis Zeckendorf and
Hiram W. Fenner, Re-
ceiver, *Appellees.*

BRIEF FOR HIRAM W. FENNER, RE-
CEIVER OF SILVER BELL COP-
PER COMPANY, A CORPORA-
TION, APPELLEE

STATEMENT OF THE CASE

Louis Zeckendorf, as a stockholder of Silver Bell Copper Company, for himself and other stockholders similarly situated, brought suit against Albert Steinfeld, said Company, and the other appellants herein, on two separate and distinct causes of action, as fully appears in the third amended com-

plaint on file in the case, being the complaint upon which the case was tried, in the District Court of the First Judicial District of the Territory of Arizona, in and for the County of Pima.

The first cause of action was to recover from Steinfeld, for the benefit of the corporation, the sum of \$145,743.75, the further sum of \$103,967.00, and the further sum of \$25,750.00, which moneys, for the reasons and upon the facts set forth in the complaint, were alleged to be the moneys of Silver Bell Copper Company, which Steinfeld converted to his own use.

The second cause of action was to recover from Steinfeld, for the benefit of the corporation, the sum of \$33,000.00, being moneys alleged to have been paid to Steinfeld as a dividend upon certain shares of stock of said Silver Bell Copper Company, held by Steinfeld as trustee for said company, and which moneys said Steinfeld converted to his own use.

Both causes of action were practically for the unlawful conversion by Steinfeld of moneys belonging to the Silver Bell Copper Company.

On September 16th, 1905, judgment was rendered by the District Court in favor of Louis Zeckendorf. (Transcript of Record, pages 218, 219.) From this judgment Albert Steinfeld and the other defendants appealed to the Supreme Court of the Territory of Arizona. On May 12, 1906, that court reversed the judgment of the District Court and remanded the case for a new trial. (Transcript of Record, page 238, folio 548.)

The case was tried a second time and on July 30, 1908, the District Court rendered its judgment

against Zeckendorf on the first cause of action and in favor of Zeckendorf on the second cause of action. (Transcript of Record, pages 344 to 346.) From this judgment both Zeckendorf and Steinfeld et al appealed to the Supreme Court of the Territory of Arizona.

On March 20, 1909, the Supreme Court of the Territory of Arizona affirmed the judgment of the lower court. (Transcript of Record, page 367, folio 889.) From this judgment both Zeckendorf and Steinfeld appealed to the Supreme Court of the United States.

The Supreme Court of the Territory of Arizona made, filed and certified to the Supreme Court of the United States, a statement of the facts of the case, in the nature of special verdict, as required by the Act of Congress. (18 Stat. L., 27; 4 Fed. Stats. Ann., p. 460.) This statement of facts is set forth in Transcript of Record, pages 368 to 413 inclusive.

On June 7, 1912, this honorable court rendered its judgment upon the appeals, wherein it reversed the judgment of the Supreme Court of the Territory, insofar as that judgment affirmed the judgment of the District Court on the first cause of action, and affirmed the judgment of the Territorial Court as to the second cause of action. (Transcript of Record, pages 413, 414.)

The decision of this honorable court on these appeals is set forth in *Zeckendorf v. Steinfeld*, 225 U. S., 445-459; 56 L. Ed., 1156-1165.

As to the first cause of action, as to which the judgment of the Supreme Court of the Territory was reversed by this honorable court, the case was

remanded to the Supreme Court of the State of Arizona, as successor of the Territorial Supreme Court, "for such further proceedings as may not be inconsistent with the opinion of this court."

Under Rule 12 of the Supreme Court of the State of Arizona, (Transcript of Record, page 416, folio 1018), the clerk of that court issued under the seal of that court a remittitur to the Superior Court of Pima County, commanding that court to take such action in the premises as by the mandate of the Supreme Court of the United States shall be proper. (Transcript of Record, pages 2-6.)

On February 5, 1913, Louis Zeckendorf moved the Superior Court of Pima County for judgment, and thereafter and on March 1, 1913, he filed an amended motion for judgment and decree which contained the form of judgment requested. (Transcript of Record, pages 9-16.) Steinfeld and the other defendants filed elaborate exceptions to this motion for judgment. These exceptions were overruled, and on July 1, 1913, the Superior Court, upon the motion of Louis Zeckendorf, entered judgment "in accordance with the views expressed in the decision rendered by the Supreme Court of the United States in this matter." The judgment is set forth in Transcript of Record, pages 96-101.

On June 25, 1913, the defendants (appellants) filed their motion to set aside this judgment; and on the same day filed their motion for a new trial. (Transcript of Record, pages 101-106.) These various motions were denied and Steinfeld and other defendants appealed from the judgment so rendered, to the Supreme Court of the State of Arizona.

Hiram W. Fenner, Receiver of the Silver Bell Copper Company, a corporation, was by order of court, substituted in the case on appeal, for the Silver Bell Copper Company. Transcript of Record, page 170, folio 397.

Zeckendorf, appellee, and Fenner, receiver, filed motions to dismiss the last mentioned appeal, upon, amongst other grounds, that as the judgment of the lower court was in accordance with the decision and mandate of the Supreme Court of the United States, there was nothing to review.

On February 28, 1914, the Supreme Court of the State of Arizona granted this motion, and the appeal of Albert Steinfeld and the others was dismissed. (Transcript of Record, page 190.)

The reason and grounds for the dismissal, are fully set forth in the opinion rendered by the State Supreme Court in granting the motion. Transcript of Record, pages 185-190.

From this judgment dismissing their appeals, Albert Steinfeld and other defendants have appealed to this honorable court.

ARGUMENT

APPELLANTS' ASSIGNMENT OF ERROR I

That the Supreme Court erred in dismissing their appeal and not hearing the same on the merits.

Transcript of Record, page 195, folio 454.

When Zeckendorf's motion for judgment was made and heard by the trial court, under the man-

date of the Supreme Court of the State of Arizona, the facts of the case had been theretofore found and finally determined in the "statement of the facts of the case in the nature of a special verdict," which theretofore had been made, filed and certified to by the Supreme Court of the Territory of Arizona, as set forth in Transcript of Record, pages 368-413; and the law of the case had been settled and determined by this honorable court in its decision rendered in the case of Zeckendorf v. Steinfeld, 225 U. S., 445-459; 56 L. Ed., 1156-1165.

Therefore, it was the duty of the trial court to render a judgment in accordance with the law, as settled by this honorable court, and the facts, as found and determined by the Supreme Court of the Territory; and that is what the trial court did.

Upon the appeal from that judgment the only question for the consideration of the Supreme Court of the State was, whether or not the judgment, so rendered, was in accordance with the law as settled by this honorable court, and the facts of the case as found and determined in the statement of facts in the nature of a special verdict.

If that judgment was in accordance therewith, then it was proper for the State Court to dismiss the appeal; if the judgment was not in accordance therewith, then it was the duty of the State Court to amend it so that it should be in accordance with the decision of this honorable court, under the facts so found and determined in the statement of facts aforesaid.

Such is the procedure of this honorable court upon a second appeal.

"An appeal will not be entertained by this court from a decree entered in the circuit or other inferior courts in exact accordance with our mandate upon a previous appeal. Such a decree, when entered, is, in effect, our decree, and the appeal would be from ourselves to ourselves. If such an appeal is taken, however, we will, upon the application of the appellee, examine the decree entered, and if it conforms to the mandate, dismiss the case with costs. If it does not, the case will be remanded with appropriate directions for the correction of the error."

Steward vs. Salamon, 97 U. S., 361; Law Ed., Book 24, p. 1044.

Humphrey vs. Baker, 103 U. S., 736; Law Ed., 26, p. 456.

McKall Jr. vs. Richards, 116 U. S., 45; Law Ed. 29, p. 558.

Kingsbury vs. Buckner, 134 U. S., 671; Law Ed. 33, p. 1056.

Gaines vs. Caldwell, 148 U. S., 228; Law Ed. 37, p. 432.

Aspin M. & S. Co. vs. Billings, 150 U. S., 37; Law Ed. 37, pp. 986-9.

U. S. vs. New York Indians, 173 U. S., 464; Law Ed. 43, p. 769.

The Supreme Court of the State of Arizona has followed the same procedure. That court, after a careful consideration of all the objections made by appellants to the judgment of the lower court, decided that the judgment was in strict accordance with the mandate of this honorable court, as applied to the findings of fact theretofore made by the Supreme Court of the Territory, and there being nothing to review, it dismissed the appeal.

The opinion of the State Supreme Court in rendering its judgment of dismissal is a full answer to this first assignment of error. It is set forth in full in Transcript of Record, pages 185 to 190.

The statement of the facts of the case made by the Supreme Court of the Territory upon the first appeal, was in accordance with the provisions of the Act of Congress relative to appeals from the Supreme Court of the Territories, which provides:

"That on appeal, instead of the evidence at large a statement of the facts of the case in the nature of a special verdict, and also the rulings of the court on the admission or rejection of evidence when excepted to, shall be made and certified to by the court below, and transmitted to the Supreme Court together with the transcript of the proceedings and judgment or decree."

18 Stat. L., 27; 4 Fed. Stats. Ann., p. 460.

This honorable court has repeatedly held, in construing this statute, that the findings of fact of the territorial court, made under the provisions of this Act of Congress, are conclusive upon this court as to all questions of fact.

"Upon appeal from the Supreme Court of a territory this court is precluded under the statute from reviewing any question of fact, and the finding of the court below is conclusive upon this court as to all such questions. The jurisdiction of this court on such an appeal apart from exceptions duly taken on rulings on the admission or rejection of evidence, is limited to determining whether the findings of fact support the judgment."

Bear Lake & R. Water Wks. vs. Garland, 164 U. S.; 41 L. Ed., 327 (quoting from p. 334 Harrison vs. Perea, U. S., 311; 42 L. Ed., 168.

Eagle M. & I. Co. vs. Hamilton, 218 U. S., 513; 54 L. Ed., 1131.

Gildersleeve vs. N. M. M. Co., 161 U. S., 573; 40 L. Ed., 812.

Haws vs. Victoria Copper Co., 160 U. S., 303; 40 L. Ed., 436.

Idaho etc. Land Imp. Co. vs. Broadway, 123 U. S., 509; 33 L. Ed., 435.

L. Zeckendorf vs. Johnson, 123 U. S., 617; 31 L. Ed., 277.

Eilers vs. Bratman, 111 U. S., 356; 28 L. Ed., 454.

As the statement of the facts so made and certified by the territorial Supreme Court is binding upon this court on appeal; as such statement contains the particular facts upon which this court bases its decision and judgment; it necessarily follows that when the case is remanded by this court to the lower court for such proceedings as may not be inconsistent with the opinion of this court, the lower court has no power or authority to set aside such statement of facts, or to change or alter the same, or to grant a new trial, so that a different statement of facts might be found.

It becomes the duty of the lower court, upon the case being so remanded, to render its judgment in accordance with the law as determined by this honorable court, and as applied to the facts which *therefore* had been so found and forever determined.

Therefore, the only judgment which the trial court could render upon the case being remanded to it, was a judgment based upon such findings of fact; and the only action for the State Supreme Court to take in an appeal from said judgment was to dismiss such appeal if the judgment so rendered was in accordance with the law as applied to such statement of facts.

As the State Supreme Court found that the judgment of the Superior Court was in accordance with the mandate of this honorable court, and its own mandate, the appeal from that judgment was properly dismissed.

APPELLANTS' ASSIGNMENT OF ERROR II

That the Supreme Court of the State erred in dismissing the appeal for the reason that the judgment of the Superior Court "provided for certain matters which were not treated or passed upon by the Supreme Court of the United States, to wit, interest," attorneys' fees, etc.

Transcript of Record, page 196, folio 455.

The point made in this assignment of error is, that the Supreme Court of the State erred in dismissing the appeal, for the reason that the only matter considered by this honorable court in its opinion in the case on appeal, was whether or not Steinfeld had misappropriated certain moneys belonging to the Silver Bell Copper Company, while the judgment of the Superior Court provided for other matters, to

wit: interest on the moneys misappropriated by Steinfeld; attorneys' fees to be allowed plaintiff for his successful prosecution of the suit; disposition of other moneys belonging to the Silver Bell Company held by Steinfeld; which other matters were not treated or passed upon by this honorable court.

Whether or not the judgment of the Superior Court, as to the various matters specified in this assignment of error was correct or not, can be determined only by a consideration of the law of the case, as settled by this honorable court, and upon the statement of the facts of the case, as settled by the Supreme Court of the Territory.

The Supreme Court of the State upon the appeal from this judgment did consider it in view of the law as settled by this honorable court, and the facts as theretofore settled by the territorial Supreme Court, and it held that the judgment was in strict accordance therewith; and so holding, the judgment of the State Supreme Court in dismissing the appeal, was necessarily correct.

Whether interest should have been allowed on the amounts of money misappropriated by Steinfeld and which he was required to pay to the Receiver of the corporation, is a question specifically raised by appellants' Assignment of Error VIII, and we will consider that question when we consider that assignment.

Whether the amount allowed to plaintiff for attorneys' fees was proper or not is specifically raised in appellants' Assignment of Error VI, and we will consider that question when we consider that assignment.

Whether other sums of money belonging to the Silver Bell Copper Company, and which were held by Steinfeld under a writ of garnishment issued against the Company, or under an agreement with the Company, should or should not be paid over by him to the Receiver, is a question specifically raised in appellants' Assignment of Error V, and we will consider that question also when we consider that assignment.

If, however, the judgment of the lower court as to these various matters, is correct, and is warranted under the law, as settled by this honorable court, and the facts as settled by the Supreme Court of the Territory, then the order of the State Supreme Court dismissing appellants' appeal was not erroneous; on the other hand, if that judgment is erroneous as to any of these matters, then, under the state of this record, and upon this second appeal, this honorable court has ample jurisdiction to cause the same to be modified.

APPELLANTS' ASSIGNMENT OF ERROR III

That the Supreme Court of the State erred in dismissing the appeal for the reason that the Superior Court erred in not trying the case de novo.

Transcript of Record, page 196, folio 456.

It is the contention of appellants that, notwithstanding that all of the issues of fact made by the pleadings in this case have been settled and determined in the statement of facts in the nature of a

special verdict, made and certified to by the Supreme Court of the Territory upon the first appeal, nevertheless, the Superior Court should utterly have disregarded this adjudication of the facts and have granted appellants a new trial so that the same issues could again be tried and perhaps different findings of fact be made as to those issues.

A mere statement of this contention of the appellants shows it is utterly without merit and unworthy of serious consideration.

The findings of fact so made by the Supreme Court of the Territory, in accordance with the Act of Congress, which makes it the duty of that court to make such findings, being conclusive on this honorable court, must necessarily be conclusive on all of the courts subordinate to this court.

If the jurisdiction of this honorable court is limited, as held by this court in the numerous cases heretofore cited, to determine whether or not the facts as found "support the legal conclusions which the court below has raised on them," how idle, how presumptuous it would be, for any court subordinate to this honorable court to attempt to ignore or set aside the findings of fact which so bind this honorable court, and having set the same aside, attempt to retry the case and to make new findings of fact, or to render a new special verdict, on the matters and issues which have been so finally settled and determined.

"When the merits of a case have been once decided by this court on appeal the Circuit Court has no authority, without express leave of this court, to grant a new trial, a rehearing

or a review, or to permit any defense on the merits to be introduced by amendment to the answer."

In re Potts, 166 U. S., 258; 41 L. Ed., 994-996.

"When a case has been once decided by this court on appeal and remanded to the Circuit Court, whatever was before this court and disposed of by its decree, is considered as finally settled."

In re Sanford Fork & Tool Co., 160 U. S., 247-259; 40 L. Ed., 414-417.

Judge Caldwell, in rendering the decision of the Circuit Court of Appeals, Eighth Circuit, in the case of *Haley vs. Kilpatrick*, 104 Fed. Rep., 147-649, said:

"It is well settled that a second appeal or writ of error in the same case only brings up for review the proceedings of the trial court subsequent to the mandate, and does not authorize a reconsideration of any question either of law or fact which was considered or determined on the first appeal or writ of error, citing *Gridge Co. vs. Steward*, 3 How., 413, 425; 11 L. Ed., 658; *Sizer vs. Many*, 16 How., 98; 14 L. Ed., 861; *Tyler vs. Magwire*, 17 Wall., 253, 283; 21 L. Ed., 576; *Phelan vs. City & County of San Francisco*, 20 Cal., 39, 44; *Lesse vs. Clark, Id.*, 388."

APPELLANTS' ASSIGNMENT OF ERROR IV

This assignment is to the effect that a trial de novo should have been granted by the Superior Court, so that it could determine the intent of Albert Steinfeld

in voting for the rescinding of the resolution at the stockholders' meeting, upon which question of intent appellants urge there is no finding in the "statement of the facts," and as to which question of intent in his so voting, Steinfeld has never had his day in court.

Transcript of Record, page 198, folio 461.

We submit, however, that all the facts in regard to the stockholders' meeting held December 26, 1903, at which the resolution referred to by appellants was adopted, are fully found and set forth in the statement of facts made and certified to by the Supreme Court of the Territory. We particularly refer to finding XXXII, Transcript of Record, pages 393 to 402; and finding XXXIII, Transcript of Record, pages 402 to 407.

These facts were fully considered by this honorable court on the first appeal. In its decision in that case (*Zeckendorf vs. Steinfeld*, 225 U. S., 445-459) this honorable court, amongst other things, said:

"We will not stop to recite the other parts of the long finding which includes all the proceedings of this meeting. At the end of the findings of fact in this connection the Supreme Court of Arizona makes this significant statement:

"In the stockholders' meeting held on the 26th day of December, 1903, hereinabove set out, plaintiff, in voting to rescind said agreement of May 20, 1903, and the resolution hereinabove mentioned, did not understand or know or believe that anybody claimed or would claim that the action taken on that day by the stock-

holders of the Silver Bell Copper Company would operate to give either Albert Steinfeld or the Mammoth Copper Company any right or claim to any of said proceeds of said sale, nor did the directors in good faith understand or believe that the stockholders intended to instruct them to rescind any portion of the agreement and resolution other than that relating to the indemnity agreement hereinbefore mentioned.'

"It is argued that this is but a conclusion, and not in any proper sense a finding of fact. If this be so, we think it is the proper conclusion from the facts stated. In our view it cannot be reasonably maintained that, in passing the resolution, when it is read in the light of the proceedings at the meeting and the known facts surrounding the parties at the time, the stockholders intended to rescind any more of the transaction than related to the indemnity agreement. On the other hand, the fair inference from the proceedings at this meeting leaves no doubt in our minds that the stockholders intended to affirm the previous transactions except so far as they related to Steinfeld's right to hold the money and notes for his indemnity, *and that Steinfeld acquiesced in such modification as one of the stockholders.*"

The foregoing quotation shows conclusively that this honorable court, in considering this case on the first appeal, did fully consider the intent of the parties, so far as the same was at all material, in voting for the resolution referred to by appellants. All questions involved as to the effect of the resolution adopted at the meeting, have been determined by this court and are *res adjudicata* in this case. There-

fore, the lower court had no power to grant a new trial to hear the same question again.

APPELLANTS' ASSIGNMENT OF ERROR V

That the Supreme Court of the State erred in awarding judgment against Steinfeld for the sum of \$25,750, asserted to have been held by Steinfeld at the time of the commencement of the action in pursuance of a certain writ of garnishment; and in awarding judgment against said Steinfeld for interest thereon.

Transcript of Record, page 199, folio 463.

A consideration of this assignment of error requires a reference to the pleadings, so as to ascertain the issues made therein, as to the item \$25,650, and then a reference to the findings of fact as made by the Supreme Court of the Territory upon the issues so made.

We will show that under the issues, as to this sum of money, made by the pleadings, and the findings of fact thereon, as made by the Supreme Court of the Territory, it was the duty of the Superior Court to award judgment against Steinfeld for this sum of money with interest thereon, and therefore, that the Supreme Court of the State of Arizona did not err in dismissing the appeal from that judgment as to this item, for the reason that it was in strict accordance with the issues as made by the pleadings, and the findings upon those issues as made by the Supreme Court of the Territory.

First as to the pleadings. In Par. V of the third amended complaint, filed January 4, 1908, upon which the case was tried, the allegations as to this \$25,750 item are set forth. It is therein alleged that Steinfeld, Curtis and Shelton, purporting to act as the Board of Directors of the Silver Bell Copper Company, did, on the 16th day of January, 1904, adopt a resolution at the request and direction of Steinfeld—we will quote the language of the complaint:

“That on or about the 16th day of January, 1904, the said Steinfeld, Curtis, and Shelton, purporting to act as the Board of Directors of said corporation, purported to adopt and pass a resolution and cause the same to be spread upon the minute book of said corporation, wherein and whereby the parties so acting as aforesaid, recited the fact that Steinfeld and the said Mammoth Copper Company claimed that their interests in the properties conveyed as hereinbefore set out

“And thereupon the said Steinfeld, Curtis and Shelton, at said purported meeting, and purporting to act as the Board of Directors of said corporation, and as an act prepared by and for said Albert Steinfeld, and at his request and on his direction, further resolved, that the said Silver Bell Copper Company should pay to the said Steinfeld personally and for his own individual use and benefit, one half of the cash already received less” (certain expenses and commissions), “and that the said Silver Bell Copper Company should also, at the same time, deliver or cause to be delivered to the said Steinfeld, one of the two promissory notes belonging to said corporation, still remaining unpaid and still in the

hands of the corporation, and that said Steinfeld should retain as his own the sum of \$25,750, being one-half of the sum of \$51,500 still in his hands belonging to said Silver Bell Copper Company and garnisheed by one Franklin as its property."

Transcript of Record, pp. 260, 261, fols. 610, 611.

This allegation in the Complaint is clearly that the Board of Directors passed a resolution, in which, amongst other things, it was resolved that Steinfeld should retain *as his own* the sum of \$25,750, which at the time was in his hands, being one-half of the sum of \$51,500, which had theretofore been garnisheed by Franklin. Such being the allegation as to the resolution adopted by the Board of Directors, the Complaint further alleges:

"That thereupon said Curtis, being then the Treasurer of said Silver Bell Copper Company paid to the said Albert Steinfeld the sum of \$145,743.75 and delivered or caused to be delivered to said Albert Steinfeld one of said notes. That said Steinfeld also retained the said sum of \$25,750, still remaining in his hands as aforesaid, and thereupon *converted the same* and said sum of \$145,743.75 and said note so delivered to him as aforesaid and the proceeds thereof, *to his own use and benefit*, and not to the use or benefit of any other person, firm or corporation, except J. N. Curtis, as hereinafter alleged, *and has ever since, does now retain the same*, and has not, nor has any part thereof ever been paid back to the Silver Bell Copper Company or returned to it, *and nothing whatever on account thereof has ever been paid*

to said corporation or for it, but the whole remains unpaid making a total sum of \$275,460.75, and all of which said Albert Steinfeld, before the commencement of this action, received and used as his own property and not as the property of any other person, firm or corporation, thereby converting said sum to his individual use and benefit and not to the use and benefit of any other person, firm or corporation, excepting as herein specifically alleged and set out."

Transcript of Record, pp. 261-262, fols. 612, 613, 614.

In this Paragraph V of his Third Amended Complaint, Zeckendorf specifically alleges that Steinfeld converted all this sum of \$25,750 to his own use; that he has never paid the same or any part thereof to the company or for it; that Steinfeld had so converted to his own use, this sum and the sum of \$145,743.75 and the \$100,000 note, before the commencement of this action. These allegations of the conversion of this sum of \$25,750, and the other sums, by Steinfeld, are clear, distinct, and unequivocal.

Now the defense which Steinfeld made to these allegations is set forth in the following denials and affirmative allegations of his answer, to wit:

"Denies: that the action of the directors of the said company in paying or causing to be paid to the said Albert Steinfeld any note or moneys was without right, or that the said Albert Steinfeld, at any time appropriated or converted to his own use the sum of \$145,763.75 or any funds of the said Silver Bell Copper

Company or any funds or note or notes belonging to the said Silver Bell Copper Company; and deny that the said Board of Directors on the said 16th day of January or at any time passed any resolution to the effect that the said Silver Bell Copper Company, should deliver or cause to be delivered to the said Steinfeld any promissory note belonging to said corporation or to the effect that the said Steinfeld should retain as his own the sum of \$25,750, being one-half of the sum of \$51,500 in his hands belonging to the said Silver Bell Copper Company and garnisheed by one Franklin as its property, or any sum whatever.

"The defendants deny that the said Steinfeld before the commencement of this action received the said sum of \$145,743.75 and the said notes or either of them, or the said sum of \$103,967, the proceeds of said note, or the sum of \$25,750 as his own property and not as the property of any other person, firm or corporation, thereby converting said sum to his individual use or benefit, and not to the use or benefit of any other person, firm or corporation; and alleges that the said sum of \$145,743.75 and the said promissory note and the proceeds of the said promissory note were received by the said Steinfeld as belonging to himself and the defendant, the Mammoth Copper Company, as being one-half of the purchase price of the group of mines sold to the Imperial Copper Company, and as being a proportion thereof recognized by the Board of Directors of the company to rightfully belong to the said Mammoth Copper Company, and which did not belong to said Silver Bell Copper Company, and that the said money and note paid to the said Steinfeld were paid by authority of the said Mammoth Copper Company and as its agent

and was received by him in pursuance of such authority and as such agent."

Transcript of Record, pp. 290, 291, fols. 693-695.

If this answer is analyzed the denials will be seen to be as follows:

(1) Denial that the action of the directors of said company in paying or causing to be paid to the said Albert Steinfeld, any note or moneys, was without right.

2) Denial that Steinfeld at any time appropriated or converted to his own use any funds or note of the Silver Bell Copper Company.

(3) Denial that the Board of Directors passed any resolution to the effect that the said Steinfeld should retain as his own the sum of \$25,750, being one-half of the sum of \$51,500 in his hands belonging to said Silver Bell Copper Company and garnisheed by one Franklin, as its property.

(4) Denial that Steinfeld received the said sum of \$145,743.75 and the note or proceeds thereof or the sum of \$25,750, "as his own property, and not as the property of any other person, firm, or corporation, thereby converting said sum to his own individual use and benefit, and not to the use or benefit of any other person, firm, or corporation."

That is the end of the denials.

Then follow, in this paragraph of Steinfeld's answer, his affirmative allegations, which are to the effect that he received the \$145,743.75 and the note and the proceeds thereof, as belonging to himself and the Mammoth Copper Company, as being one-half of the sale of the mines to the Imperial

Copper Company, and which did not belong to the Silver Bell Copper Company. That is all. There is no affirmative allegation as to how, or why he received or retained the \$25,750. He does not allege it was garnisheed in the Franklin suit; or that he held it or retained it as the property of the Silver Bell Copper Company, garnisheed in his hands. This question, or defense, was not in the case according to the pleadings.

Steinfeld, as to this sum of \$25,750, makes no affirmative defense whatsoever; makes no affirmative allegations whatsoever; but simply denies, that the action of the directors in paying any moneys to him was without right; denies that he converted to his own use any moneys or funds of the Silver Bell Copper Company; denies the effect of the resolution passed by the directors as to this \$25,750, and denies that he received this sum as his own property, and not as the property of any other person, firm or corporation, thereby converting it to his own use and not to the use of any other person, firm or corporation.

The allegations of the Complaint are, that this money belonged to the Silver Bell Copper Company, that Steinfeld received it; that he retained it; that no part of it has been paid back to the corporation or returned to it; and "nothing whatever on account thereof has ever been paid to said corporation or for it, but the whole remains unpaid."

None of these allegations are denied in the answer, except, perhaps, the passage of the resolution by the Board of Directors.

The allegation of the Complaint, that he converted it to his own use; a legal conclusion and not a fact, is denied in the answer; but none of the facts alleged in the Complaint, upon which this legal conclusion is based, are denied in the answer.

The denial of a legal conclusion raises no issue of fact. The facts themselves, as alleged in the Complaint, are not denied; therefore are admitted.

So then, according to the pleadings, it is admitted. (1) that the Silver Bell Copper Company is and was the owner of the \$25,750; (2) that Steinfeld received the same under the order of the Board of Directors; (3) that he still retains the same; (4) that no part of it has been paid back to said company; (5) that no part of it has been paid for or on account of the company.

Upon these admissions, and we call them admissions because the allegations thereof in the Complaint are not denied in the answer, the Silver Bell Copper Company was entitled to judgment against Steinfeld for this sum of \$25,750 with interest.

We will now turn to the Findings of Facts, made by the Territorial Supreme Court, and quote therefrom the findings so far as the same relate or affect this issue.

"That after the 21st day of May, 1903, and some time in the month of May or June, 1903, S. M. Franklin, claiming to be a creditor of the said Silver Bell Copper Company, brought an action against the said Silver Bell Copper Company for the sum of \$51,500, and in said action garnisheed the sum of \$51,500, as the property of the Silver Bell Copper Company,

then in the hands of said Albert Steinfeld. The said action is entitled 'S. M. Franklin, Plaintiff, vs. Silver Bell Copper Company, Defendant,' and was brought in this court. That after said garnishment was levied on said Albert Steinfeld, and some time in the month of January, 1904, said Albert Steinfeld paid back to the Silver Bell Copper Company \$25,750 of said \$51,500 in his hands, retaining the other \$25,750 as security against the said garnishment under an agreement with the said Silver Bell Copper Company that he would hold and retain \$25,750 in his hands as such security against said garnishment, and that after paying to said S. M. Franklin any moneys that might be recovered, or for which he might get judgment in said action, he would pay to the Silver Bell Copper Company the balance of \$25,750 so left in his hands as security after deducting the money so paid to him, said S. M. Franklin.

"The said Albert Steinfeld thereafter continued to hold and at the time of commencement of this action still held said sum of \$25,750 as such security, the same being the property of the said Silver Bell Copper Company."

XXIX Finding of Fact. Transcript of Record, p. 392, fol. 958.

"That on the 26th day of December, 1903, and prior to the said stockholders' meeting, the said Steinfeld turned over to the said J. N. Curtis, Treasurer of the said Silver Bell Copper Company, all funds in his hands belonging to said company except the sum of \$51,500 which had been garnisheed in his hands in a suit pending against the said company, instituted by one Selim M. Franklin, and except certain money and two promissory notes which

had been deposited by him with the Bank of California."

XXIV Finding of Fact. Transcript of Record, p. 407, fol. 996.

The finding in XXIX is that after the garnishment was levied, and sometime in January, 1904, Steinfeld returned one-half of the sum of \$51,500 to the Silver Bell Copper Company, and retained in his hands the other one-half thereof, to wit \$25,750, under an agreement with the company that he would hold and retain this sum in his hands as security against said garnishment, and that after paying therefrom to said Franklin any moneys for which he might get judgment, he (Steinfeld) would pay the balance to the Silver Bell Copper Company.

This finding settles and determines conclusively that the \$25,750 belonged to the Silver Bell Copper Company, and that it was in the hands of Steinfeld under an agreement with the company that he should repay therefrom any judgment Franklin might recover in his suit, and the balance he should pay to the Silver Bell Copper Company.

The other findings made by the court simply repeat in part, the facts as above found. And this is the beginning and the end of the Findings of Fact, which affect the issue as to this \$25,750.

In the judgment rendered by the lower court on July 30, 1908, from which the first appeal was taken, the lower court decreed that Steinfeld held the \$25,750 as moneys of the Silver Bell Copper Company and as security against said garnishment, and directed Steinfeld to account to the company or its receiver for said sum, and to pay to the com-

pany or its receiver the balance of said sum after deducting therefrom such sums, if any that he properly and in accordance with law may have paid for the benefit of said company. (Transcript of Record, p. 423, fol. 1031.)

This judgment being upon the first cause of action, was reversed by this honorable court in its general reversal of the judgment on the first cause of action. So that it became necessary, under the mandate of this court, for the Superior Court to render such a judgment thereon, as under the pleadings and facts as found in the Findings of Fact was right and equitable.

The judgment so rendered by the Superior Court is, that Steinfeld pay to the receiver this sum of \$25,750, with interest at six per cent per annum from January 16, 1904; that Steinfeld render an account of all moneys lawfully paid out by him, if any, by reason of the Franklin garnishment and that in such account he be allowed interest at six per cent per annum from January 16, 1904, to the date of the settlement or accounting upon the sums paid out by him and allowed by the court, etc. (Transcript of Record, p. 98, fols. 229-230.)

That is, under this judgment, from which the present appeal is taken, Steinfeld is to repay to the receiver the full amount of \$25,750 with interest, and after having done so he is to be allowed such sums, if any, as he may have paid out by reason of the garnishment, with interest thereon from January 16, 1904.

But, as it is admitted in the pleadings that Steinfeld still retains this sum; it being admitted that

he has not paid it back to the company, and has paid no part thereof, for or on account of the company, it follows, as a conclusion of law, that he must return this money to the company. He received the money rightfully, according to the Finding of Fact, but he has detained and retained it unlawfully, according to the admission in the pleadings.

The Finds of Fact do not find that Steinfeld still retains the money as security for the Franklin garnishment. There is no finding that any judgment was ever rendered under the Franklin garnishment, and Steinfeld in his answer does not allege there was.

There was really no fact at issue in regard to this \$25,750 item, except as to the passage of the resolution by the Board of Directors, to the effect that Steinfeld should retain this \$25,750 as his own. And on this one point, the Territorial Supreme Court found against Steinfeld, in finding that he received it, not as his own money, but as the money of the Silver Bell Copper Company, and that he still retains the same.

As it was Steinfeld's duty to repay this money to the Silver Bell Copper Company, and there being no allegation in his answer, and no Finding of Fact in the findings, which excuses his not paying the same back to the company, he should be charged interest thereon from the date of its detention.

"It is a general rule, both in law and in equity, that whenever one has wrongfully detained or misappropriated the moneys of another, he must pay interest at the legal rate

from the date of the misappropriation or from the beginning of the detention."

Cooper vs. Hill, 94 Fed., 532; 136 C. C. A., 402, and authorities hereafter cited in this brief.

In view of all the other findings of fact in regard to the action of Steinfeld in appropriating such vast sums of money belonging to the Silver Bell Copper Company, to his own use, and of his power over the Board of Directors to pass the various resolutions, under his domination and control, relative to these sums of money and to this sum of \$25,750; and in view of the further fact that Steinfeld does not allege in his answer that he had any right whatsoever to retain this sum of \$25,750, we submit that the judgment rendered by the Superior Court, requiring Steinfeld to repay this sum with interest, was proper and the only judgment that could have been rendered under the pleadings and findings, and therefore should be affirmed, and the Supreme Court of the State so held.

In this same judgment the lower court has provided, that Steinfeld may render an account of all moneys which he lawfully paid out by reason of this Franklin garnishment, if any, and as to such sums he be allowed the same with interest at six per cent per annum from January 16, 1904. And this is equitable and right, and fully protects Steinfeld in the premises.

Zeckendorf filed his first Complaint in this action on the 27th day of January, 1904. He filed the Third Amended Complaint, upon which the case was tried the last time before the Territorial Dis-

trict Court, on January 4, 1908, about four years after the commencement of the suit. The Franklin garnishment was levied in June, 1903, four years and a half before Steinfeld filed his answer to the Third Amended Complaint. It is fair to presume that the garnishment proceeding was terminated and ended at that time; nevertheless, Steinfeld does not, in his answer, lay any claim to this sum of \$25,750, or to any part thereof, by virtue of any payment made by him on account of such garnishment; nor does he, in his answer, even attempt to justify his retention of the money by virtue of the garnishment being then in force.

Again we submit, that under the pleadings and the Findings of Fact and all the other facts surrounding this case, the only equitable judgment which the lower court could render in regard to this item of \$25,750, was the judgment rendered by the lower court.

APPELLANTS' ASSIGNMENT OF ERROR VI

**In regard to attorneys' fees allowed
attorneys for Louis Zeckendorf.**

Transcript of Record, page 200, folio 465.

It seems to be conceded that Louis Zeckendorf having, as a stockholder of the Silver Bell Copper Company, prosecuted successfully this action on behalf of the company, whereby he recovered for the company a large sum of money, is entitled to compensation for the attorneys he has employed to prosecute the suit. The only question involved is

the amount of compensation his attorneys should receive.

The Superior Court, in its judgment in this case, allowed to the attorneys for Louis Zeckendorf ten per cent upon the full amount of moneys recovered, as compensation for their services.

This allowance was made by the Superior Court based upon the following Finding of Fact, in regard to the value of their services, made by the Supreme Court of the Territory, in the Statement of Facts in the nature of a special verdict, being Finding XXXIX, which is as follows:

"That this action is prosecuted by the plaintiff above named, as a stockholder of the said defendant, the Silver Bell Copper Company, and not otherwise, and that all of the sums of money expended by him as and for costs and attorneys' fees in the prosecution of this action are expended for the benefit of the said Silver Bell Copper Company, and not for the benefit of this plaintiff, except as he is a stockholder of said corporation; that this plaintiff, in that regard, has employed as attorneys for the bringing of this action for the benefit of the Silver Bell Copper Company, Edwin A. Meserve of Los Angeles, California, and Frank H. Hereford of Tucson, Arizona, and has agreed to pay the said attorneys reasonable fees for the services rendered in this action, and which said fees and all other expenses and obligations incurred by this plaintiff, in the bringing of this action, should be paid to plaintiff, or to those to whom he is obligated therefor by the said defendant, Silver Bell Copper Company, out of the moneys which it may receive as the result of the bringing and

prosecuting of this action; that ten per cent of the amount for which judgment is finally given in this action, is and will be a reasonable amount to be allowed plaintiff as a charge against said Silver Bell Copper Company, as attorneys' fees for bringing and prosecuting this action for its benefit."

Transcript of Record, p. 343, fol. 834.

As we have already shown, the Superior Court was bound by this Finding of Fact and it had no power of jurisdiction to consider the question again.

APPELLANTS' ASSIGNMENT OF ERROR VII

That the Superior Court erred in permitting the attorneys for Zeckendorf to prepare the form of judgment which was rendered by that court.

Transcript of Record, pag 204, folio 473.

This Assignment of Error is too frivolous to merit consideration.

APPELLANTS' ASSIGNMENT OF ERROR VIII

That the Superior Court erred in rendering judgment for interest upon the two principal sums of money which it was adjudged Steinfeld had misappropriated and which he was required to repay to the corporation or its receiver.

Transcript of Record, page 204, folio 474.

This Honorable Court in its decision held that the moneys referred to in this assignment did not

belong to Steinfeld, but did belong to the Silver Bell Copper Company; in other words that Steinfeld had misappropriated this money. Such being the conclusion of law of this Honorable Court, upon the facts as found in regard thereto by the Supreme Court of the Territory of Arizona, it necessarily follows, upon the case being remanded, that the lower court must render judgment against Steinfeld for the sums of money which he so misappropriated. As to this, appellants raise no question.

The lower court rendered judgment against Steinfeld for the moneys so misappropriated by him and also that he pay interest thereon at the legal rate, as prescribed by the law of Arizona, to-wit, six per cent per annum.

It is the common law, so held by all the authorities, that upon the recovery of money unlawfully withheld or detained, interest is allowed as damages.

"Interest, when not stipulated for by contract, or authorized, by statute, is allowed by the courts as damages for the detention of money, or property, or of compensation, to which the plaintiff is entitled."

U. S. vs. North Carolina, 136 U. S., 211-222;
34 L. ed., 336-341.

"Where money is retained by one man against the declared will of another who is entitled to receive it, and who is thus deprived of its use, the rule of courts in ordinary cases is, in suits brought for the recovery of the money, to allow interest as compensation to the creditor for such loss. Interest in such cases is considered as damages, and does not

form the basis of the action, but is an incident to the recovery of the principal debt."

Stewart vs. Barnes, 153 U. S., 456; 38 L. ed., 781-785.

"Another objection to the decree is that the court below allowed interest on the amount misappropriated, and it is contented that this is erroneous, because this case does not fall among those in which interest is expressly allowed by the statutes of Colorado (*Mills Ann. St.* §2252). But this is a suit in equity, and no statute is necessary to give a court of equity power to allow interest on money unjustly detained or misappropriated

When money has been misappropriated or converted to his own use by a defendant, interest is given as damages to compensate the complainant for the loss of the use of his funds it is a general rule, both at law and in equity, that whenever one has wrongfully detained or misappropriated the moneys of another, he must pay interest at the legal rate from the date of the misappropriation or from the beginning of the detention."

Cooper vs. Hill, 94 Fed., 582; 36 C. C. A., 402.

"Counsel urge that it is not specifically shown whether the interest allowed upon this claim, was for interest or damages caused by the misappropriation of the funds and thus being kept out of its use from the time it was taken until the rendition of the judgment. They allege, if interest, it could not be allowed for the period prior to the date of the demand. When a director or officer of a bank has misappropriated its funds, he

is liable for interest on the amount from the date of such taking as damages. When such interest is not provided for by statute, the courts of the state have allowed its equivalent in the way of damages for the taking and detention of the money."

Brown vs. First Nat. Bank, 113 P., 483-486; 49 Colo., 393.

"We have no statute regulating this subject and none is necessary. Upon the principles of the common law, we think it clear that interest is to be allowed, where the law by implication makes it the duty of the party to pay over the money to the owner without any previous demand on his part. Thus where it was obtained and held by fraud, interest should be calculated from the time it was received."

Dodge vs. Perkins, 9 Pick., (26 Mass.), 368-394.

"The money was obtained by the defendant wrongfully, and wrongfully detained. It was not due him, and he had no right then or since to hold it. Interest should, therefore, be allowed from the time of the receipt by him."

Atlantic Nat. Bank vs. Harris, 118 Mass., 147-154 (quoted from page 154).

"In the case now under consideration, money belonging to the plaintiff was received by the defendant, who claimed it and illegally withheld it from the plaintiff, and he ought, therefore, to pay interest."

Greenly vs. Hopkins, 10 Wend., 96.

"In this court whenever money has been received by a party, which *ex aequo et bono* he ought to refund, interest follows as a matter of course."

Barr vs. Haseldon, 10 Rich. Eq. (S. C.), 53.

In the case of *Rapelis vs. Emory*, 1 Dallas, 349; 1 L. Ed., 170, it was said:

"Where one man has received money belonging to another, and has retained it without the consent of the owner, it is to be considered in the same light as money lent, and ought to carry interest."

In the note to the case, in the reprint in Bk. 1, L. Ed., 170, is the following:

"In the case of *Crawford et al. vs. Willing, et al.*, S. C. Dec. T., 1803, the question of interest was fully discussed; and the following points ruled on the charge to the jury, viz.: 4th. That law, equity and good conscience, concur in making every man pay interest, who retains the money of another, without permission, and, a *fortiori* if it is retained contrary to his duty as an agent."

"In the case of *New Dunderberg Mining Company vs. Old*, 97 Fed., 150; 38 C. C. A., 8, the court, in substance, held, that where one has wrongfully converted the money or property of another, interest on the money is recoverable from the date of the conversion, and it is practically immaterial whether it is allowed as interest or as damages.

"The general rule established by the great weight of authorities is, that where there is a contract, express or implied, to pay money, even though such contract be silent as to interest, interest will be allowed upon its breach, as damages, and not because of any promise to pay it."

22 Cyc., 1495, and host of authorities there cited.

Counsel for appellants contend that the statute of Arizona, on the subject of interest, does not provide for interest on moneys unlawfully misappropriated, or unlawfully withheld.

The answer to this contention is found in the cases above cited. Thus, as said in *Stewart vs. Barnes*, 153 U. S., 456, *supra*,

"Interest in such cases, is considered as damages, and does not form the basis of the action, but is an incident to the recovery of the principal debt."

The statute of Arizona, referred to by appellants, is as follows:

"In the absence of an agreement, in writing, signed by the debtor, interest shall be paid at the rate of six per cent per annum on money due on any bond, bill, promissory note or other instrument in writing, on judgments, on money lent, on the sum due on accounts stated, on the sum due, from the time it is audited, from the territory, any county, city or village; Provided, however, a different rate of interest, if agreed to in writing, signed by the payor, shall be paid. A judgment rendered on such agreement shall bear the rate of interest provided for in the agreement, and it shall be so specified in the judgment."

Sec. 2774, Rev. Stats. of Ariz., 1901.

This statute applies only to *express* contracts, which the parties themselves make, which are silent as to the rate of interest.

The statute says nothing as to the rate of interest upon implied contracts; and nothing as to interest which shall be allowed in the nature of damages for money unlawfully detained or misappropriated.

Therefore, there being no statute as to what rate of interest shall be allowed in the nature of damages, for money unlawfully detained or misappropriated; the amount is left to the sound discretion of the court.

The argument of counsel for appellants, that Steinfeld was entitled to retain this money, under the indemnity contract of May 20, 1903, which has been rescinded, or that he was entitled to retain it as any kind of a trustee, can have no weight whatsoever, in view of the allegations of Steinfeld's answer in the case, in which he alleges:

"That the said sum of \$145,743.75, and the said promissory note and the proceeds of said promissory note were received by said Steinfeld, as belonging to himself and the defendant, the Mammoth Copper Company, as being one-half of the purchase price of the group of mines sold to the Imperial Copper Company, and as being a proportion thereof recognized by the board of directors of the Company, to rightfully belong to the said Mammoth Copper Company and to the said Steinfeld, as the owners of the mines, which were sold to the Imperial Copper Company, and which did not belong to said Silver Bell Copper Company."

Par. V, Steinfeld's Answer, Transcript of Record, page 291, folio 695.

This honorable court in its decision in this case, did not pass upon the question whether interest should or should not be allowed, in the way of damages, upon the moneys which it decided Steinfeld had unlawfully misappropriated; but this court has uniformly held:

"That when the allowance or disallowance of interest is a question left open by the mandate, the lower court may allow interest on its decree."

Ency. of U. S. Sup. Court Rep., Vol. 8, 143.

In re City Nat. Bank, 153 U. S., 246; 38 L. Ed., 705.

Ex parte Republic of Columbia, 195 U. S., 604; 49 L. Ed., 338.

We submit that the allowance of interest, in the way of damages by the lower court in this case, was proper and should be upheld.

APPELLANTS' ASSIGNMENT OF ERROR IX

That the Supreme Court of the State erred in dismissing the appeal from the judgment of the Superior Court as to the second cause of action, insofar as it exceeded in amount the judgment of the lower court which had been affirmed by this honorable court on the first appeal.

Transcript of Record, page 205, folio 475.

The practice in Arizona does not contemplate or provide for two final judgments in one suit or proceeding, therefore, upon this case being remanded to the Superior Court for proceedings in accordance with the mandate of this honorable court, it was necessary for the Superior Court to enter one judgment in accordance with this mandate, which would cover both the first and second causes of action, set forth in the complaint.

As the judgment theretofore rendered by the lower court in the second cause of action has been affirmed by this honorable court on the first appeal, all that was necessary was to repeat or re-enter the judgment as to this first cause of action; and an inspection of the judgment which was rendered by the Superior Court will show that the amount of the recovery upon the second cause of action is precisely the same as set forth in the original judgment on this cause of action; it is practically a repetition of the judgment on the second cause of action which was affirmed. The original judgment on the second cause of action was that Steinfeld should pay to the Silver Bell Copper Company the sum of \$20,850, with interest thereon at the rate of 6% per annum from the 20th day of January, 1904. (Transcript of Record, page 422, folio 1030.) This judgment is dated July 30, 1908. (Transcript of Record, page 423, folio 1031.)

The amount of the interest, from January 20, 1904, to July 30, 1908, is not computed and set forth in the judgment. But this is purely a matter of computation. It amounts to the sum of \$5,664.25. Therefore, the total amount which Steinfeld was required to pay to the Silver Bell Copper Company, by this first judgment, of date July 30, 1903, was the sum of \$26,514.25.

Under the Arizona statute this judgment for this total sum of \$26,514.25 bears interest at the rate of six per cent per annum from the date of the judgment until paid.

When we turn to the judgment entered on July 31, 1913, under the mandate of this honorable court,

we see that the amount is the same as set forth in the first mentioned judgment, that is, the principal sum plus interest to the date of the first judgment, amounting in the aggregate to \$26,514.25, and interest on that sum from July 30, 1908, until paid. See Par. 5 of New Judgment, Transcript of Record, page 99, folio 231.

In other words the judgment entered by the Superior Court on July 31, 1913, is for the same sum of money as that entered by the District Court on July 30, 1908; therefore the appellants are not injured thereby. The same thing is expressed only in a different way.

APPELLANTS' ASSIGNMENT OF ERROR X

That the Supreme Court of the State erred in dismissing the appeal from the order of the Superior Court refusing to discharge the Receiver in said action.

Transcript of Record, page 205, folio 476.

Appellants herein assign as error the overruling by the lower court of their motion to discharge the receiver. The motion is set forth at page 107, folio 253, Transcript of Record.

The first ground or reason assigned for the discharge of the receiver is, that the Silver Bell Copper Company has no debts and that Steinfeld and Zeckendorf are its only stockholders. In support of the statement that the corporation has no debts, is appended the *ex parte* affidavit of J. N. Curtis, President of the Silver Bell Copper Company, in which he

swears "that said corporation is not indebted to anyone whatsoever, except Steinfeld, one of the above named defendants."

Such an *ex parte* affidavit is not proof of anything. It does not bind anyone who may be a creditor of the corporation, other than J. N. Curtis himself. The order appointing the receiver requires that all the liabilities of the corporation be paid. It is the duty of the receiver to ascertain and determine under the orders of the court, what these liabilities or debts may be, and this *ex parte* affidavit amounts to nothing.

The statement that there are no other stockholders than Zeckendorf and Steinfeld is also only supported by the *ex parte* affidavits of Gerald Jones and J. N. Curtis. But the lower court evidently took judicial notice of the fact that there is pending before it on appeal, the suit of Mary Nielson vs. Silver Bell Copper Company and Steinfeld, in which Nielson claims to be the owner individually and as executrix, of 30% of all the shares of stock of the corporation. And until that suit is finally determined the lower court cannot decide to whom distribution of the assets of the corporation shall be made upon the final dissolution thereof. The large sums of money which Steinfeld must repay to the corporation, or to its receiver, must be held by the receiver, until the Nielson suit is finally determined. If there is no receiver, then Steinfeld will continue to hold and retain this money in the future, as he has done in the past.

Again, if it were true that Steinfeld and Zeckendorf are the only stockholders of the company, nev-

ertheless as the Articles of Incorporation provide that the business of the corporation shall be conducted by a board of three directors, who shall be stockholders, it will be impossible for the affairs to be conducted at all, except by Steinfeld and Zeckendorf as directors. And in such event Steinfeld, by refusing as a director to vote in favor of any resolution for the declaration of a final dividend, or the payment to the stockholders of any money, could continue to retain the large sums of money in his hands. So in any event a receiver is necessary to protect the interests of Zeckendorf.

Again, Steinfeld being the stockholder, who has more than a majority of the shares of the stock of the corporation, could, by assigning one share to each of two of his employees, elect his own board of directors and continue that domination and control of the corporation which he had when the matters complained of in the complaint arose, and since has had.

Indeed, every condition which would warrant and require a court of equity to appoint a receiver for this corporation would continue to exist.

However, we will not burden this brief, or the court, with further argument on this question.

This honorable court, in its decision on the first appeal, said:

"It is contended that it was wrong to appoint a receiver in the case, but we think that, in view of the situation of the property and the final winding up of the company, the appointment of the receiver was proper, and that that

officer should be continued for the final settlement of the affairs of the company."

Zeckendorf vs. Steinfeld, 225 U. S., 445, 459.

This completes the consideration of all the errors assigned by appellants upon this appeal.

The Supreme Court of the State of Arizona, in its opinion rendered in dismissing appellants' appeal, considered each of the points which appellants endeavor to raise on the present appeal, citing abundant authority to show that there was no merit whatsoever in the appeal. So that if appellants were not apprised of the fact that their appeal to the State Supreme Court was utterly frivolous, they were and must have been fully aware of that fact, after the state court rendered its decision.

That appellants present appeal is frivolous; that they raise no question of law which has not already been heretofore decided by this honorable court, either upon the first appeal in the present case, or in other cases heretofore decided by this court, where the same questions were involved, is manifest from a consideration of the errors they assign.

It is also clear from the record in this case, that in 1903 Albert Steinfeld unlawfully appropriated to his own use more than \$200,000 of the moneys belonging to Silver Bell Copper Company. That after nine years of litigation, wherein Louis Zeckendorf, as a stockholder of the corporation, sought on its behalf to recover this money for the corporation, this honorable court decided that Steinfeld had misappropriated the amount of money, as claimed, which practically determined the litigation.

On November 12, 1912, the mandate of this honorable court was issued to the lower court to carry out this decision in accordance with its opinion and judgment.

The lower court has done what this court has directed it to do. And now, nearly three years after the mandate was issued out of this court, Steinfeld by this second appeal, raising questions frivolous and without any merit, brings the case again before this court on a second appeal.

And during all this time, he has retained and kept in his possession, by giving a supersedeas bond, all the moneys which he misappropriated as alleged in the first cause of action, being upwards of \$200,000.

The fact that he is chargeable with interest at the rate of six per cent per annum on these moneys which he still retains, and which eventually he will have to pay, is, we submit, no adequate excuse for his prosecuting the present frivolous appeal, which can and will accomplish nothing except to delay proceedings on the judgment of the lower court, rendered in accordance with the decision of this honorable court.

We further submit that it is apparent from the questions raised by appellants on this appeal, that the only object sought to be accomplished, was delay, so that Steinfeld could continue to retain the large sums of money he misappropriated nearly twelve years ago.

We therefore respectfully submit that not only should the judgment of the state court, dismissing appellants' appeal from the judgment of the Super-

ior Court be affirmed, but that damages at the rate of not to exceed 10 per cent, in addition to interest, be awarded upon the amount of the judgment, as provided by Rule 23 of this honorable court.

Respectfully submitted,

EDWIN F. JONES,

*Attorney for Hiram W. Fenner, Receiver of
Silver Bell Copper Company, appellee.*

SELIM M. FRANKLIN,
Of Counsel.

SUBJECT INDEX

	PAGE HEREIN
Statement of the Case.....	1
Consideration of Appellants' Assignment of Error I, that the State court erred in not denying the appeal.....	5
Consideration of Appellants' Assignment of Error II, that State court erred in dismissing the appeal.....	10
Consideration of Appellants' Assignment of Error III, that lower court erred in not trying the case <i>de novo</i>	12
Consideration of Appellants' Assignment of Error IV, that a trial <i>de novo</i> should have been granted by the lower court.....	14
Consideration of Appellants' Assignment of Error V, that the lower court erred in rendering judgment against Steinfeld for a sum of \$25,750, with interest thereon.....	17
Consideration of Appellants' Assignment of Error VI, in regard to the amount of attorney's fees allowed attorneys for Louis Zeckendorf.....	30
Consideration of Appellants' Assignment of Error VII, that the Superior Court erred in permitting the attorneys for Zeckendorf to draft form of judgment.....	32
Consideration of Appellants' Assignment of Error VIII, that the lower court erred in rendering judgment for interest upon the moneys which Steinfeld had misappropriated.....	32

Consideration of Appellants' Assignment of Error IX, that said court erred in dismissing the appeal from the judgment of the lower court as to the second cause of action.....	39
Consideration of Appellants' Assignment of Error X, that the State court erred in dismissing the appeal from the judgment of the Superior Court, refusing to discharge the Receiver herein.....	41
Request for damages for frivolous appeal and for delay.....	44

LIST OF AUTHORITIES CITED

	PAGES WHERE CITED
Arizona Statute on Interest, Sec. 2774, R. S. A. of 1901.....	37
Aspin M. & S. Co. vs. Billings, 150 U. S., 37...	7
Atlantic Nat. Bank vs. Harris, 118 Mass., 147.	35
Barr vs. Haseldon, 10 Rich. Eq. (S. C.), 53....	35
Bear Lake etc. vs. Garland, 164 U. S., 41.....	9
Brown vs. First Nat Bank, 113 Pac., 483; 49 Colo., 393.....	35
City Nat. Bank, In re, 153 U. S., 246.....	39
Cooper vs. Hill, 36 C. C. A., 402.....	29, 34
Cyc., Vol. 22, p. 1495.....	36
Dodge vs. Perkins, 9 Pick. (26 Mass.), 368....	35
Eagle M. & I. Co. vs. Hamilton, 218 U. S., 513..	9
Eilers vs. Bratman, 111 U. S., 356.....	9
Gaines vs. Caldwell, 148 U. S., 228.....	7
Gildersleeve vs. N. M. M. Co., 161 U. S., 303...	9
Greenly vs. Hopkins, 10 Wend., 96.....	35
Haley vs. Kilpatrick, 104 Fed. Rep., 147.....	14
Haws vs. Victoria Copper Co., 160 U. S., 303..	9
Humphrey vs. Baker, 103 U. S., 736.....	7
Idaho etc. Land Co. vs. Broadway, 123 U. S., 509.....	9
Kingsbury vs. Buckner, 134 U. S., 671.....	7
McKall Jr. vs. Richards, 116 U. S., 45.....	7
New Dunderberg M. Co. vs. Odd, 38 C. C. A., 8.	36
Potts, In re, 166 U. S., 258.....	14

PAGES WHERE CITED

Rapelis vs. Emory, 1 Dallas, 349.....	36
Republic of Columbia, ex parte, 195 U. S., 604.	39
Sanford Fork & Tool Co., In re, 160 U. S., 247.	14
Stewart vs. Barnes, 153 U. S., 456.....	34, 37
Stewart vs. Salamon, 97 U. S., 361.....	7
U. S. vs. New York Indians, 173 U. S., 464....	7
U. S. vs. North Carolina, 136 U. S., 211.....	33
Zeckendorf vs. Johnson, 123 U. S., 617.....	9
Zeckendorf vs. Steinfeld, 225 U. S., 445-459....	3, 6, 15, 43

Office Supreme Court, U. S.

FILED

OCT 9 1915

JAMES O. MAHER

CLERK

IN THE
SUPREME COURT
OF THE
UNITED STATES.

October Term 1915.

No. 239.

Albert Steinfeld, R. K. Shelton, J.
N. Curtis, Silver Bell Copper
Company and Mammoth Copper
Company,

Appellants,

vs.

Louis Zeckendorf and Hiram W.
Fenner, Receiver,

Appellees.

Motions to Dismiss Appeal.

EDWIN A. MESERVE and

FRANK H. HEREFORD,

Attorneys for Appellee Louis Zeckendorf.

IN THE
SUPREME COURT
OF THE
UNITED STATES.

October Term 1915.

No. 239.

**Albert Steinfeld, R. K. Shelton, J.
N. Curtis, Silver Bell Copper
Company and Mammoth Copper
Company,**

Appellants,

vs.

**Louis Zeckendorf and Hiram W.
Fenner, Receiver,**

Appellees.

Motions to Dismiss Appeal.

Now comes Louis Zeckendorf, one of the appellees herein, and moves this Honorable Court to dismiss this appeal, or to dismiss the same and affirm with 10% damages for a frivolous appeal, on the following grounds:

FIRST: That this is an appeal from the action of the Supreme Court of the state of Arizona dismissing an appeal to it from the Superior

Court of the county of Pima, state of Arizona. That no federal or other question is involved for which an appeal or writ of error to this Honorable Court from a state court is provided for by law.

SECOND: That under the laws of the United States no *appeal* lies from the action of a state court to this Honorable Court.

THIRD: That this case was on appeal to this Honorable Court once heard, determined on the merits, and remanded for further proceedings not inconsistent with this court's opinion; that the judgment and decree from which this second appeal is taken is not inconsistent with this court's opinion on the first appeal, but was and is in conformity thereto; that therefore no ground for this appeal exists. That this appeal is frivolous and taken for delay only.

Wherefore this appellee asks that this appeal of appellants be dismissed, and if consistent with the rules and opinion of this Honorable Court, that the judgment from which this appeal is taken be affirmed, with 10% damages as a penalty for a frivolous appeal, taken for delay only.

Respectfully submitted,

E. A. MESERVE,

FRANK H. HEREFORD,

Attorneys for Appellee Louis Zeckendorf.





IN THE
SUPREME COURT
OF THE
UNITED STATES.

October Term 1915.

No. 239.

**Albert Steinfeld, R. K. Shelton, J.
N. Curtis, Silver Bell Copper
Company and Mammoth Copper
Company,**

Appellants,

vs.

**Louis Zeckendorf and Hiram W.
Fenner, Receiver,**

Appellees.

**Brief of Appellee Louis Zeckendorf on Motions
to Dismiss.**

EDWIN A. MESERVE and

FRANK H. HEREFORD,

Attorneys for Appellee Louis Zeckendorf.

TABLE OF CONTENTS.

	PAGE
Statement of Case of First Two Grounds of Motion to Dismiss.	1 to 5
Court without jurisdiction	
1st—Because appeal is from de- cision of a State Court etc.	
2nd—No right of Appeal. Re- lief of review, if any, by writ of error.	
Argument on First Ground of Motion to Dismiss	5
Argument on Second Ground of Motion to Dismiss	5 and 6
Statement of the Case on Third Ground of Motion to Dismiss..	7 to 17 inc.
Statement of general facts of case	7
Case formerly before this court on two appeals	11
Title and numbers of same..	11
Decision by this court thereon	11
History of case after decision by this court	12
Abstract of judgment by <i>nisi</i> <i>prius</i> court, entered pursu- ant to mandate of this court	12 to 17
History of case after entry of judgment by <i>nisi prius</i> court	17

	PAGE.
Argument on Motion and on merits generally	18 to 28
Statement of portions of judgment appealed from to this court ..	19
Case when first before this court was decided upon its merits. Effect of, argued..	20 et seq.
Claim of Appellants in lower court that case should have been retired	24
Same claim asserted here	24
Decisions of this court that unless ordered, case not to be retried ..	25 et seq
Language used by this court in its mandate, as basis for appellant's claim of right to new trial	26
Authorities construing similar language in mandates of this court ..	27
Consideration in detail of the judgment of the Superior Court ..	28 et seq.
Appeal from order denying motion to discharge receiver is without right	29

	PAGE.
Statement of allegations of complaint and denials of answer..	29 & 30
Issue raised and passed upon by this court	32
This court's decision thereon....	32
Paragraphs Second, Third and Fourth of judgment are matters already passed upon and decided by this court on former appeal ..	29 to 36
The \$33,000.00 covered by Fifth paragraph of judgment directly before and decided by this court ..	36
Reason why this amount restated in present judgment	37
Other reasons why this court cannot modify judgment as to paragraph Fifth thereof.....	38
No appeal taken by the sureties against whom judgment also went ..	38-39
Judgment as to costs, paragraphs Sixth and Seventh	39
Paragraph Eighth—no appeal therefrom ..	40
Paragraph Ninth—Judgment for Attorney's fees as to First Cause of Action	40

The finding on which this part of judgment is based, before this court and passed on, and affirmed on former appeal....	41
Paragraph Tenth of judgment also based on issues and findings before this court on former appeal	42
Interest properly allowed and included in the judgment.....	43
Damages should be assessed against appellants for a frivolous appeal	44

TABLE OF AUTHORITIES CITED.

	PAGE
Act of Congress, Sec. 237, approved March 3rd, 1911	6
Aspin M. & S. Co. v. Billings, 150 U. S. 37, Law Ed. 37, pp. 986-9.....	23
Arizona Revised Statutes 1901, par. 1496, p. 463	39
Arizona Revised Statutes 1901, par. 2774, p. 736	44
Arizona Revised Statutes 1913, par. 3505, p. 1219	44
Camou v. U. S. 171 U. S. 277, Law Ed. 43, p. 163 1st Ap.	28
Camou v. U. S. 184th U. S. 572, Law Ed. 46, p. 694 2nd Ap.	28
Cole's Admr. v. Kelsey, 13 Tex. 75.....	37
Crawford v. Milling, 4 Dal. U. S. 286, Law Ed. Vol. 11, p. 836	43
Cyc. Vol. 22, p. 1568	37
Cook on Corporations, Vol. III, p. 2089 (4th Ed.)	41
Cook on Stock and Stockholders, p. 979, paragraphs 748-9	41
Dower v. Richards, 151 U. S. 658; Law Ed. 38, p. 305	6
Ency. of U. S. Sup. Ct., Reports, Vol. 2, pp. 412-15	26

	PAGE.
Ency. of Pleading & P. Vol. II, p. 971, note 2	37
Ency. of U. S. Sup. Ct. Rep. Vol. 2, pp. 65-6	38
Gaines v. Caldwell, 148 U. S. 228, Law Ed. 37, p. 432	23-24-26
Germania Ins. Co. v. Lady Pike, 1st Ap. 88 U. S. 1017, Law Ed. 22, pp. 499-504	27
Germania Ins. Co. v. Lady Pike, 2nd Ap. 96 U. S. 461 Law Ed. p. 672.....	21-22-27
Humphrey v. Baker, 103 U. S. 736, Law Ed. 26, p. 456	22
Holden v. Freeman's S. & T. Co., 100 U. S., p. 75, Law Ed. Vol. 25, p. 567.....	44
Kingsbury v. Buckner, 134 U. S. 671, Law Ed. 33, p. 1056	22
Lincoln v. Clafflin, 74 U. S. pp. 132-9 Law Ed. Vol. 19, pp. 106-9.....	43
McKall, Jr. v. Richards, 116 U. S. 45, Law Ed. 29, p. 558	22
Meaker etc. v. Winthrop Iron Co., 17 Fed. p. 48, Fed. Stats. Anno. Vol. 7, p. 226..	41
Northern Pacific R. R. Co. v. James Holmes, 155 U. S. 137, Law Ed. 39, p. 99	5
Potts & Co. v. Creager, 1st Ap. 155 U. S. 597-610, Law Ed. 39, pp. 275-280.....	27

	PAGE.
Potts & Co. 2nd Ap. 166 U. S. pp. 263-8,	
41 Law Ed. p. 994	21-27
Stewart v. Salamon, 1st ap. 94 U. S. 434-7	
Law Ed. 24, p. 275-6.....	27
Stewart v. Salamon, 2nd Ap. 97 U. S. 361,	
L. E. Vol. 24, p. 1044	21-22-27
Sherman v. Ward, 9 Ariz. 327, 83 Pac. 356	22
Snyder v. Pima County (53 Pac. 6) 6 Ariz.	
41 ..	22
Skillen's Executors v. May's Executors, 6	
Cranch U. S. p. 267 Law Ed. Vol. 3,	
p. 220; first appeal reported in 4 Cranch	
137, L. E. Vol. 2 p. 574.....	24
Supervisors of Wayne County v. Mt. Ver-	
non R. R. Co., 94 U. S. 498, Law Ed.	
Vol. 24, page 260	26
Sanford Fork & T. Co. v. Howe, Brown	
& Co., 157 U. S. 312, Law Ed. 39, p.	
713, First Appeal	27
Sanford Fork & T. Co. v. Howe, Brown	
& Co., 160 U. S. 247, Law Ed. Vol. 40,	
p. 414, Second Appeal	22-27-28
Supervisors v. Kennicott, 83 U. S. 452 Law	
Ed. 21, pp. 319-22, First Appeal.....	28
Second Appeal, 94 U. S. 499 Law Ed.	
Vol. 24 p. 26	22-28

	PAGE.
Stringfellow v. King, 98 U. S. p. 610 Law	
Ed. 25, p. 421	42
Spalding v. Mason, 161 U. S. 375, Law	
Ed. Vol. 40, p. 738	43
Stewart v. Barnes, 153 U. S., pp. 455-65,	
Law Ed. Vol. 38, pp. 781-5.....	44
Trustees v. Greenough, 10 U. S. 527, Law	
Ed. 26, pp. 1157-62.....	41
U. S. v. State of North Carolina, 136 U. S.	
p. 211, Law Ed. Vol. 34, p. 336.....	43
U. S. v. New York Indians, 173 U. S. 464,	
Law Ed. 43, p. 769.....	23
Young v. Godbe, 82 U. S. 566, Law Ed.,	
Vol. 21, p. 250	43
Zeckendorf v. Steinfeld (Ariz.) 100 Pac.	
784	42
Zeckendorf v. Silver Bell Copper Co., et al.	
225 U. S. p. 445; Law Ed. Book 56, p.	
1156	20-28-32

IN THE
SUPREME COURT
OF THE
UNITED STATES.

October Term 1915.

No. 239.

**Albert Steinfeld, R. K. Shelton, J.
N. Curtis, Silver Bell Copper
Company and Mammoth Copper
Company,**

Appellants,

vs.

**Louis Zeckendorf and Hiram W.
Fenner, Receiver,**

Appellees.

**Brief of Appellee Louis Zeckendorf on Motions
to Dismiss.**

**Statement of Case of First Two Grounds
for Motion to Dismiss.**

This suit was brought and judgment and decree rendered in the District Court of the First Judicial District, territory of Arizona, in and for Pima county. An appeal from the judgment and decree was taken to the Supreme

Court of the territory of Arizona. This last court reversed the judgment and decree and remanded the case for a new trial. The lower court again tried the case and rendered a judgment and decree which was in favor of plaintiff on the second cause of action and against plaintiff on the first cause of action. In due course both parties appealed to the Supreme Court of the territory of Arizona, which court affirmed the judgment and decree of the lower court. Both parties then appealed to this Honorable Court. Pending the appeal in this court the territory of Arizona was admitted as a state. This court affirmed the action of the territorial Supreme Court, insofar as the latter court affirmed the judgment of the lower court on the second cause of action, but reversed the action of the territorial Supreme Court in affirming the judgment of the lower court on the first cause of action.

The case was remanded to the Supreme Court of the state of Arizona, as the statutory and legal successor of the Supreme Court of the territory of Arizona, for further proceedings not inconsistent with the opinion of this court given in this case. The Supreme Court of the state of Arizona remanded the case to the Superior Court of Pima county, state of Arizona (the legal and statutory successor to the lower territorial court) with appropriate instructions.

The said state Superior Court thereupon entered the judgment and decree which in its opinion was made necessary by the action of this Honorable Court. Appellants appealed from this judgment and decree to the Supreme Court of the state of Arizona, which dismissed the appeal on the grounds that the judgment and decree of the lower court was in strict conformity to its mandate and to the mandate of this Honorable Court. Appellants thereupon appealed to this Honorable Court.

ARGUMENT ON THE FIRST GROUND OF THE
MOTION TO DISMISS.

This appeal is not from a judgment or decree or from any other action of a territorial court. It is from a judgment and decree of a state court. It involves no right raising a federal or other question, for which provision is made by law for an appeal to this Honorable Court. This court is therefore without jurisdiction to hear or entertain this appeal.

Northern Pacific R. R. Co. v. James
Holmes, 155 U. S. 137, Law. Ed. 39,
p. 99.

ARGUMENT ON THE SECOND GROUND OF THE
MOTION TO DISMISS.

The statutes of the United States provide that under certain circumstances a case may be re-

moved from a state court to this Honorable Court by *Writ of Error*.

Sec. 237 Judicial Act of Congress, approved March 3rd, 1911.

Dower v. Richards, 151 U. S. 658; Law Ed. 38, p. 305.

There is, however, no provision of law for removing a case from a state Supreme Court to this Honorable Court by *an appeal*.

THIRD GROUND OF MOTION TO DISMISS.

As we interpret the laws relating to this appeal, this court is not given any jurisdiction to entertain or hear this appeal, unless the jurisdiction of the case obtained by this court on the first appeal has never been lost, and is and will be retained till a proper judgment, not inconsistent with the opinion of this court given on the first appeal, has been entered by the lower court.

In making our motions to dismiss on jurisdictional grounds, we have done what we conceive our duty to this court and to ourselves demanded. We should very much prefer, however, that this court in this proceeding examine the judgment and decree of the lower court, for the purpose of determining whether it is inconsistent with the mandate of this court.

If this court has retained jurisdiction for this

purpose, then possibly the only ground upon which we have the right to object to this appeal is that the judgment and decree was not brought to this Honorable Court by the proper procedure. We have, therefore, joined our third ground for our motion to dismiss to our jurisdictional grounds, so that if we can waive our right to object to the procedure by which the case is brought to this court for the purposes aforesaid, it will be decided that we have done so.

STATEMENT OF THE CASE ON THIRD GROUND
OF MOTION TO DISMISS.

This is a stockholders' suit brought by Louis Zeckendorf in behalf of the Silver Bell Copper Company, alleging that Albert Steinfeld and the other individual defendants, R. K. Shelton and J. N. Curtis, were the directors and officers of the said company; that the defendant the Mammoth Copper Company was a corporation owned and controlled by Albert Steinfeld, and was but another name under which he did business, in some of the matters involved in this case; that the said directors of the Silver Bell Copper Company wrongfully passed a resolution authorizing and directing the company's treasurer to deliver to Albert Steinfeld \$145,743.75 in cash; a certain note having a par value of \$100,000; \$33,000 in cash, being a dividend on 300 shares of the capital stock of the company; and au-

thorizing the said Steinfeld to retain the sum of \$25,750, then part of the company's funds held by Steinfeld in garnishment proceedings in another suit; that Steinfeld had received, held and converted to his own use the said sums of \$145,743.75 and \$33,000 and \$25,750, and the said note for \$100,000. Steinfeld and the other defendants in this suit claimed that Steinfeld was rightfully the owner and entitled to the possession of said sums of money and said note, and that said resolution had only been passed in recognition of that fact. The controversy grew out of the following facts:

The Silver Bell Copper Company owned and operated certain mines; from time to time other mines were acquired and added to the group; the titles, however, to many of the mines subsequently acquired were taken and held in the names of Steinfeld or the Mammoth Copper Company, and 300 shares of the capital stock of the Silver Bell Copper Company were purchased by Steinfeld for the company. Later the company sold all its mines and property for \$515,000. This \$515,000, being part cash and part notes, was paid to Steinfeld as treasurer of the Silver Bell Copper Company. After the payment of the \$515,000, Steinfeld, on conditions which were expressed in a set of resolutions passed by the board of directors of the Silver Bell Copper Company, amongst which

was one authorizing Steinfeld to retain the physical possession of the money, relinquished his claim to the said 300 shares of stock and all of the money except the sum of \$18,117, which was then and thereupon paid him. Zeckendorf, a stockholder, objected to the resolution giving Steinfeld the physical possession of the money, and at a stockholders' meeting thereafter held, the particular resolution authorizing Steinfeld to retain the physical possession of the money was rescinded. Thereafter, Steinfeld, one of the company's directors, and Shelton and Curtis, the other two directors, both of whom were under Steinfeld's direction and control, at a meeting of the directors claimed that the stockholders had rescinded *all* of the resolutions. They then proceeded, by means of a preamble and resolutions, to set forth and state that by rescinding the said resolutions the rights of Steinfeld in and to the mines and the proceeds of the mines and to the 300 shares of the capital stock of the Silver Bell Copper Company were revived; that these rights of Steinfeld, prior to the passage of the rescinded resolutions, entitled him to an undivided one-half interest in all of the mines sold, and therefore to an undivided one-half interest in the proceeds of said sale, and also entitled him to the ownership of, and to all dividends accruing from, the said 300 shares of the capital stock of the said Silver Bell

Mining Company, and by said resolutions they authorized and directed the treasurer of the company to pay the said Steinfeld \$145,743.75 in cash, one note of the par value of \$100,000, and the \$25,750 held by Steinfeld in garnishment proceedings; they further recognized Steinfeld's claim to the said 300 shares of stock and directed the payment to him of \$33,000 in cash, being a dividend of \$110 per share thereon. The District Court of Pima county, Arizona territory, being the court in which the case originated, rendered a judgment and decree in favor of the plaintiff Zeckendorf as such stockholder, for the benefit of the Silver Bell Copper Company and against the said defendants, for the full claim of the plaintiff. On appeal to the Supreme Court of the territory of Arizona, this judgment and decree was reversed and the case sent back for a new trial. Whereupon, the complaint was amended and reframed so that the claims for the sums of \$145,743.75, \$25,750, and the note for \$100,000 were embraced in one cause of action denominated the first cause of action; and the claim for \$33,000 was embraced in another cause of action denominated the second cause of action. On the second trial, the District Court, in the first cause of action, gave judgment confirming Steinfeld's title to the \$145,743.75 and the note for \$100,000, but required Steinfeld to account to the Silver Bell

Copper Company for the \$25,750. On the second cause of action the District Court gave judgment for plaintiff and against Steinfeld for the sum of \$20,850, being the said \$33,000, less certain moneys paid by Steinfeld in acquiring the title to said 300 shares of capital stock. From this judgment both parties appealed to the Supreme Court of the territory of Arizona, which latter court on hearing affirmed the decision of the District Court. Both parties thereupon appealed to this Honorable Court. These two appeals were in this court heard as one at the October, 1911, term. The numbers and titles of the two appeals in this court were as follows:

No. 139. Louis Zeckendorf, appellant, v. Albert Steinfeld, J. N. Curtis, R. K. Shelton *et al.*

No. 140. Albert Steinfeld, J. N. Curtis, R. K. Shelton *et al.*, appellants, v. Louis Zeckendorf and Silver Bell Copper Company.

The decision of this Honorable Court on the said two appeals was rendered June 7th, 1912, and is reported in Volume 225, U. S. Supreme Court Reports at page 445; Law Edition, Vol. 56, page 1156. As will be seen from the reading of the decision of this Honorable Court, the case was tried and decided upon its merits. In accordance with its decision, this Honorable Court reversed the judgment of the Supreme Court of the territory of Arizona "insofar as it affirms the judgment of the District Court on

the first cause of action"; affirmed the judgment of the Supreme Court of the said territory insofar as it affirmed the judgment of the said District Court on the second cause of action; and remanded the case "for such further proceedings as may not be inconsistent with the opinion of this court," to the Supreme Court of the state of Arizona.

In due course the Supreme Court of the state of Arizona (the successor to the Supreme Court of the territory of Arizona) remanded the case to the Superior Court of Pima county (the successor to the territorial District Court in which the case originated) for such action as was proper under the mandate of this Honorable Court. Thereupon, in due course, the said Superior Court refused numerous applications on the part of Steinfeld *et al.* for a new trial or any other similar action, and entered a judgment and decree which, succinctly stated, is as follows:

FIRST: Renewing and confirming the appointment, originally made, of Hiram W. Fenner, as receiver of the property and assets of the said Silver Bell Copper Company.

SECOND: In the first cause of action, decreeing that Albert Steinfeld was indebted to and should pay the said receiver \$127,626.75 (being the amount of \$145,753.75, less the said sum of \$18,117) with interest at 6% per annum from

January 16, 1904, to the date of the decree of said Superior Court, viz., July 1st, 1913. Said interest amounted to \$72,428.18, which, added to said \$127,626.75, made a total of \$200,054.93. On this last amount interest was adjudged at the rate of 6% per annum from the date of judgment, viz., July 1st, 1913, until paid, and execution was ordered issued.

THIRD: In the first cause of action, that Albert Steinfeld was indebted to and should pay the said receiver the further sum of \$100,000 with interest at the rate of 6% per annum from May 20th, 1903, to the date of judgment, viz., July 1st, 1913. Said interest amounted to \$60,833.33, and, added to said \$100,000, made a total of \$160,833.33, for which amount judgment was entered, together with interest from said July 1st, 1913, at 6% per annum until paid, and execution was ordered to issue.

FOURTH: In the first cause of action, that Albert Steinfeld was indebted to and should pay said receiver the further sum of \$25,750, together with interest thereon from January 16, 1904, to said July 1st, 1913, at 6% per annum. Said interest amounted to the sum of \$14,613.11 and said principal and interest amounted on said July 1st, 1913, to \$40,363.11. That execution therefor, however, do not issue until as hereinafter ordered. That the said Albert Stein-

feld render an account of all moneys legally and lawfully paid out by him by reason of a garnishment served upon him in the case of S. M. Franklin, plaintiff, v. The Silver Bell Copper Company, described and referred to in findings 29 and 35; that in such account the said Steinfeldt be allowed interest at the rate of 6% per annum upon the said sum of \$25,750 from January 16, 1904, until the date of judgment or settlement of said garnishment proceedings; that he further be allowed interest at the rate of 6% per annum from the said date of settlement of said garnishment proceedings to the date of the allowance of his said accounting on such sum, if any, as was paid out by him and allowed by the court by reason of said garnishment proceedings. That after the said accounting, execution issue against said Albert Steinfeld for such part of the \$40,363.11 as is found due by said Steinfeld to the said Silver Bell Copper Company.

FIFTH: In the second cause of action, that said Albert Steinfeld and his bondsmen on appeal, Epes Randolph, Leo Goldschmidt, George Pusch and Fred Fleischman, are indebted to and should pay the said receiver the further sum of \$20,850, with interest thereon at the rate of 6% per annum from the 20th day of January, 1904, to the 30th day of July, 1908, amounting, prin-

cipal and interest, on the said 30th day of July, 1908, to \$26,514.25, and that said judgment for \$26,514.25 bears interest at the rate of 6% per annum from July 30, 1908, until paid. That execution issue therefor.

SIXTH: Costs: That the said Albert Steinfeld and his bondsmen on appeal, Hugo J. Donau and L. Rosenstern, are indebted to and pay to Louis Zeckendorf, plaintiff, plaintiff's costs heretofore taxed and allowed in the said judgment of July 30th, 1908, at the sum of \$662.60, together with interest thereon at the rate of 6% per annum from the said 30th day of July, 1908, until paid. That plaintiff have execution therefor.

SEVENTH: Costs: That Albert Steinfeld and his bondsmen, Geo. Pusch and Fred Fleischman, are indebted to and pay to the said plaintiff Louis Zeckendorf \$1702.64, plaintiff's costs on appeal from the Supreme Court of the territory of Arizona to the Supreme Court of the United States, together with interest thereon from date of this judgment until paid, at the rate of 6% per annum, and that plaintiff have execution therefor.

EIGHTH: Attorney's fees: That the receiver, out of the moneys to be recovered by the said Silver Bell Copper Company from said Albert Steinfeld, do pay plaintiff as and for attorneys' fees to Hon. Edwin A. Meserve and Frank H.

Hereford, for the bringing and prosecution of this action insofar as relates to the second cause of action, up to and including the entry of judgment of July 30th, 1908, the sum of \$2652.50, together with interest thereon from the said 30th day of July, 1908, until paid, at the rate of 6% per annum.

NINTH: Attorneys' fees: That the said receiver pay to plaintiff as and for additional attorneys' fees to the said Hon. Edwin A. Meserve and Frank H. Hereford, for bringing this action and the prosecution of the same up to and including the entry of this judgment, out of the moneys recovered by the Silver Bell Copper Company from the said Albert Steinfeld, the further sum of \$40,135.13 with interest from date until paid at the rate of 6% per annum.

TENTH: That said receiver, out of the moneys recovered by the said Silver Bell Copper Company from the said Albert Steinfeld, pay to plaintiff, in addition to the attorneys' fees and court costs hereinbefore ordered to be paid, all costs, expenses and obligations incurred by said plaintiff in this litigation and not herein otherwise allowed, after an account of same has been presented, audited and approved by said Superior Court.

ELEVENTH: That the said receiver, out of moneys which may be paid him by the said

Steinfeld in this action, pay to the said plaintiff all sums of money heretofore necessarily paid by said Steinfeld for and on account of the said Silver Bell Copper Company, after an account of same has been presented, audited and approved by the said Superior Court.

TWELFTH: That upon the final termination of this action, the said Silver Bell Copper Company be dissolved, and after its debts and liabilities are paid, its remaining money and assets be distributed amongst its stockholders in the proportion of their several ownerships of stock, but that said dissolution, payment, disbursements and distribution be made, done and accomplished by proper orders of the said Superior Court for that purpose and in this action made and to be made.

After the rendition of said judgment the said Steinfeld and the other defendants appealed the case to the Supreme Court of the state of Arizona, which dismissed said appeal on the grounds that the said judgment and decree of the said Superior Court was in strict accordance with its mandate in this case and in strict accordance with and in conformity to the mandate of this Honorable Court. The said Steinfeld and the other defendants in this case thereupon appealed to this Honorable Court.

ARGUMENT.

We presented a motion to dismiss this appeal on jurisdictional grounds, and a motion to dismiss the appeal and affirm the judgment of the Superior Court of Pima county, state of Arizona, with 10% damages, on the grounds that the judgment of said Superior Court is in strict conformity with the mandate of the Supreme Court of the state of Arizona, and not inconsistent with the mandate of this Honorable Court given on the first appeal of this case, and that therefore this appeal is frivolous and taken for delay only. The opening part of this brief was devoted to the jurisdictional questions. This part of this brief will be in support of the motion to dismiss and affirm. We assume that there can be no appeal to this court, upon any part of the judgment of the state Superior Court, which, though not directly authorized by, is not "inconsistent with the opinion of this court," given upon the first appeal of this case to this Honorable Court. Anything contained in the judgment of the said Superior Court, not directly authorized, but not inconsistent with the opinion of this court, is new matter, not involving a federal question, and is therefore the judgment of a state court from which there is no appeal to this court. While we assume and urge this position, we will nevertheless discuss

the Superior Court judgment in its entirety, as we believe every part of it is authorized by the opinion of this Honorable Court.

In appealing from the Superior Court of Pima county, state of Arizona, to the Supreme Court of the state of Arizona, appellants limited their appeal to that part of the judgment which related to the first cause of action and to a part of the judgment relating to the second cause of action. [Transcript of record, pages 165-8, folios 386-93.]

The appeal, as indicated by these notices, therefore, is from that part of the judgment and decree set out in paragraphs second, third, fourth and ninth, and from that part of the decree and judgment set out in paragraph fifth, which, according to appellants' idea, "exceeds in amount and differs" from the judgment in the second cause of action affirmed by this Honorable Court. There was no appeal taken from that part of the judgment contained in the "first" paragraph of said judgment, but there was an appeal taken from the order of the court denying appellants' motion to discharge the receiver appointed in the case. Appellants appealed to this court from the judgment or order of the Supreme Court of the state of Arizona, dismissing their appeal to that court from the Superior Court of the said county of Pima. Therefore appellants have limited matters in-

volved in this appeal to those paragraphs of the judgment rendered by the Superior Court numbered SECOND, THIRD, FOURTH, FIFTH and NINTH, and to the order denying appellants' motion to discharge the receiver.

The questions involved in this appeal, as we understand them, are so simple, and so long and thoroughly settled by decisions of this court, that it is with some diffidence that we cite and quote at length from decisions of this Honorable Court in support of our argument. We feel, however, that by so doing we may lessen, rather than increase, the work of this court.

It is apparent that this case was upon the first appeal heard and decided by this Honorable Court upon its merits.

Zeckendorf v. Silver Bell Copper Company *et al.*, 225 U. S., p. 445; Law Edition, book 56, p. 1156.

"When a case has once been decided by this court on appeal and remanded to the Circuit Court, whatever was before this court and disposed of by its decree, is considered as finally settled. The Circuit Court is bound by the decree as the law of the case; and must carry it into execution according to the mandate. The court cannot vary it or examine it for any other purpose than execution; or give any other or further relief; or review it even for apparent error, upon any matter decided on appeal; or intermeddle with it further than to settle

so much as has been remanded. * * * But the Circuit Court may consider and decide any matters left open by the mandate of this court; and its decision of such matters can be reviewed by a new appeal only. The opinion delivered by this court at the time of rendering its decree may be consulted to ascertain what was intended by its mandate; and either upon an application for writ of mandamus, or upon a new appeal, it is for this court to construe its own mandate and to act accordingly. * * * When the merits of a case have been once decided by this court on appeal, the Circuit Court has no authority, without express leave of this court, to grant a new trial, a rehearing or a review, or to permit new defenses on the merits to be introduced by amendment of the answer. * * * Nor will a bill of review lie in the case of newly-discovered evidence after the publication, or decree below, where a decision has taken place on an appeal, unless the right is reserved in the decree of the appellate court, or permission be given on an application to that court directly for the purpose. * * * The defeated party upon the discovery of new evidence, may, after a final decree in this court, obtain leave here to file a bill of review in the court below, to review the judgment which this court has rendered."

Re Potts, 166 U. S., pp. 263-8, 41 Law Ed., p. 994;

Stewart v. Salamon, 97 U. S. 361, L. E. Vol. 24, p. 1044;

Pearce v. Germania Ins. Co., 96 U. S. 461, L. E. Vol. 24, p. 672;

Re Sanford Fork & T. Co., 160 U. S.

247, L. E. Vol. 40, p. 414;

The Lady Pike, 96 U. S. 461, L. E. Vol.

24, p. 672;

Bd. of Supervisors v. Kennicott, 94 U. S.

499, L. E. Vol. 24, p. 260;

Sherman v. Ward, 9 Ariz. 327, 83 Pac.

356;

Snyder v. Pima County (53 Pac. 6), 6

Ariz. 41.

"An appeal will not be entertained by this court from a decree entered in the Circuit or other inferior court, in exact accordance with our mandate upon a previous appeal. Such a decree, when entered, is, in effect, our decree, and the appeal would be from ourselves to ourselves. If such an appeal is taken, however, we will, upon the application of the appellee, examine the decree entered, and if it conforms to the mandate, dismiss the case with costs. If it does not, the case will be remanded with appropriate directions for the correction of the error."

Stewart v. Salamon, 97 U. S. 361, Law Ed., book 24, p. 1044;

Humphrey v. Baker, 103 U. S. 736, Law Ed. 26, p. 456;

McKall, Jr., v. Richards, 116 U. S. 45, Law Ed. 29, p. 558;

Kingsbury v. Buckner, 134 U. S. 671, Law Ed. 33, p. 1056;

Gaines v. Caldwell, 148 U. S. 228, Law Ed. 37, p. 432;

Aspin M. & S. Co. v. Billings, 150 U. S. 37, Law Ed. 37, pp. 986-9;

U. S. v. New York Indians, 173 U. S. 464, Law Ed. 43, p. 769.

So conclusive are all matters, whether of law or of fact, presented to this Honorable Court and decided by it on appeal, that it will not permit even the vital question of jurisdiction to be raised in a case after it has decided it and by mandate sent it back to the lower court.

The following question was certified to the Supreme Court of the United States:

"In this case a final decree had been pronounced, and by writ of error removed to the Supreme Court, who reversed the decree, and after the cause was sent back to this court it was discovered to be a cause not within the jurisdiction of the court; but a question arose whether it can now be dismissed for want of jurisdiction after the Supreme Court had acted thereon. The opinion of the judges of this court being opposed on the question, it is ordered that the same be adjourned to the Supreme Court for their decision, etc."

The Supreme Court gave the following answer to the question:

"This court, after consideration, directed the following opinion to be certified to the court below, viz.: 'It appearing that the

merits of this cause had been finally decided in this court, and that its mandate required only the execution of its decree, it is the opinion of this court that the Circuit Court is bound to carry that decree into execution, although the jurisdiction of that court be not alleged in the pleadings.' ”

Skillen's Executors v. May's Executors,
6 Cranch U. S., p. 267, Law Ed. Vol.
3, p. 220; first appeal reported in 4
Cranch 137, L. E. Vol. 2, p. 574;
Gaines v. Caldwell, 148 U. S., page 228,
Law Ed. Vol. 37, p. 432, and other au-
thorities cited hereinabove.

In the lower courts, appellants' principal objection to the action of the Superior Court of Pima county in rendering the said judgment was based upon the claim that the decree of this Honorable Court authorized or directed the lower court to grant a new trial upon all matters at issue in the first cause of action in this case. So strenuous was this contention and so insistent were the efforts made to obtain a new trial, that it was apparent that this would be their principal contention in this court. The assignments of error to this court are largely predicated upon the claim of appellants that they were entitled to a new trial. [Transcript of record, pages 195-206, folios 453-76.]

There was no intimation in the opinion of this court in this case of an intention to au-

thorize or grant a new trial or to authorize in any other way the taking of new testimony. Under similar circumstances this court has repeatedly asserted that appellants have no such right, and in the language of this court:

“Obeying the mandate of this court and proceeding in conformity with its opinion in the present case were not matters within the discretion of the Circuit Court, and therefore, the cases which hold that this court will not direct in what manner the discretion of an inferior tribunal shall be exercised, do not apply to the present case. The opinion of this court proceeded distinctly upon an approval by it of the action of the Circuit Court in respect to the title and the possession, and a disapproval only of the method of accounting. * * * But the Circuit Court had no right to empower the defendant, as it undertook to do by its order of January 7, 1893, to take further testimony in support of his exceptions by way of defense to the title to the land in controversy, or to set down the cause for hearing upon the issues formed by the pleadings and such exceptions as to the title to the land or to sustain the exceptions, or to refuse to enter the decree proposed by the plaintiffs, or to refuse to grant the plaintiffs a right of possession. * * * It is contended for the respondent that the decree of this court was one absolutely reversing the decree of the Circuit Court; that the Circuit Court had a right, therefore, to proceed in the case, in the language of the mandate, not merely ‘in conformity with the right and justice,’ and that, therefore, it

had authority to permit the defendant Rugg to take further testimony in support of his exceptions, and 'by way of defense to the title to the lands in controversy' and to set down the cause 'upon the issues formed by the pleadings and exceptions aforesaid as to the title to said lands.' In other words, that the whole controversy was to be reopened as if it had never been passed upon by this court as to the title and possession of the land. This cannot be allowed, and is not in accordance with the opinion and mandate of this court."

Gaines v. Caldwell, 148 U. S., p. 288,
Law Ed. Vol. 37, p. 432.

See 100 or more cases cited in Vol. 2 Ency. of U. S. Sup. Ct. Reports, pp. 412-5.

And even when this court remanded a case with instructions to grant a new trial, it held that the lower court had no power to consider at such new trial either law or facts decided in the case by this Honorable Court.

Board of Supervisors of Wayne County
v. Mt. Vernon R. R. Co., 94 U. S.
498, Law Ed., Vol. 24, page 260.

In the lower court certain language of the mandate of this Honorable Court was referred to as authority for the lower court to grant a new trial. That language of the said mandate is as follows:

"And it is further ordered that this cause be and the same is hereby remanded to the

Supreme Court of the state of Arizona for such further proceedings as may not be inconsistent with the opinion of this court."

This language of this Honorable Court is, we believe, the usual language of its mandates, and if authority were needed to show that it is not open to any such construction as appellants attempt to place upon it, we cite the language of the mandate of this Honorable Court on first appeals and the interpretation of that language by this Honorable Court on second appeals in the following cases:

1st appeal Potts & Co. v. Creager, 155 U. S. 597-610, Law Ed. 39, pp. 275-280;

2nd appeal *re* Potts, 166 U. S., p. 263, Law Ed. 41, p. 994;

1st appeal Stewart v. Salamon, 94 U. S. 434-7, Law Ed. 24, p. 275-6;

2nd appeal, 97 U. S., pp. 361-5, Law Ed. 24, pp. 1044-6;

1st appeal Germania Ins. Co. v. Lady Pike, 88 U. S. 1017, Law Ed. 22, pp. 499-504;

2nd appeal, Pearce, Lady Pike v. Germania Ins. Co., 96 U. S. 461, Law Ed. 24, p. 672;

1st appeal Sanford Fork & T. Co. v. Howe, Brown & Co., 157 U. S. 312, Law Ed. 39, p. 713;

2nd appeal *re* Sanford Fork & T. Co.,
160 U. S. 247, Law Ed. 40, pp. 414-17;
1st appeal Bd. of Supervisors v. Kenni-
cott, 83 U. S. 452, Law Ed. 21, pp.
319-22;
2nd appeal 94 U. S. 499, Law Ed. 24,
p. 260;
1st appeal Camou v. U. S. 171 U. S.
277, Law Ed. 43, p. 163;
2nd appeal U. S. v. Camou, 184th U. S.
572, Law Ed. 46, p. 694.

CONSIDERING IN DETAIL THE JUDGMENT OF THE
SUPERIOR COURT OF PIMA COUNTY.

I.

The first paragraph of the said judgment was confirming and ratifying the appointment of the receiver theretofore made. This action of the Superior Court of Pima county was expressly authorized in the decision in this case made by this Honorable Court.

Zeckendorf v. Silver Bell Copper Co.
et al., 225 U. S., p. 445 (see p. 458),
Law Ed. 56, p. 1156 (see pp. 1164-5).

As before pointed out, no appeal was taken to the Supreme Court of the state of Arizona from this paragraph, and, consequently, none was taken to this court, but an appeal was attempted to be taken to this court, through the Arizona

Supreme Court from the order denying appellants' motion to discharge the receiver. This motion was not before this court on the first appeal. The Superior Court's action in it was new matter not involving a federal question, was not a final judgment, and therefore furnishes no ground for an appeal to this court.

To prevent repetition of arguments, we will first consider the SECOND, THIRD and FOURTH paragraphs of the said judgment together.

The complaint alleges that the officers and directors of the corporation, by a resolution of its directors, wrongfully gave to Albert Steinfeld the sum of \$145,743.75 in cash, and one note valued at \$100,000.00, and interest, and authorized the said Steinfeld to retain as his own the sum of \$25,750, belonging to the corporation, and which the said Steinfeld had in his possession subject to garnishment proceedings in another case; that the said Steinfeld retained and converted "to his own use and benefit, and not for, or to the use and benefit of any other firm or corporation, except J. N. Curtis, as hereinafter alleged, and has ever since and does now retain the same, and has not nor has any part thereof ever been paid back to the Silver Bell Copper Co. or returned to it, and nothing whatever on account thereof has ever been paid to said corporation, or for it, but the whole remains unpaid; that except as hereinafter spe-

cifically alleged, said Albert Steinfeld collected on said note prior to the commencement of this action the sum of \$103,967.00, which, with the said sum of \$25,750 and the said sum of \$145,743.25, makes a total sum of \$275,460.75, and all of which the said Albert Steinfeld before the commencement of this action had taken, received and used as his own property, and not as the property of any other person, firm or corporation, thereby converting the said sum to his individual use and benefit, and not to the use and benefit of any other person, firm or corporation, except as herein specifically alleged and set out." [Transcript of Record, pp. 261-2, folios 613-14.]

Replying to this allegation the defendants-appellants say:

"Defendants deny that the defendant Curtis, as treasurer of said company, at any or all times acted for or under the control or management of the said Albert Steinfeld, or that said Curtis as treasurer, without authority or right, paid to said Steinfeld out of the funds of the Silver Bell Copper the sum of \$145,763.75 or any sum, or delivered or caused to be delivered to said Steinfeld one of said notes; and the defendants further deny that the board of directors of the Silver Bell Copper Company, on the 16th day of January, 1904, or at any time, adopted any resolution wholly, or at all, under the control of the said Albert Steinfeld, or under his direction or management, or at his request, or as an act prepared by or for him; or that the action of

the directors of the said company in paying or causing to be paid to the said Albert Steinfeld any note or moneys was without right, or that the said Albert Steinfeld at any time appropriated or converted to his own use the sum of \$145,763.75 or any funds of the said Silver Bell Copper Company or any funds or note, or notes, belonging to the said Silver Bell Copper Company; and deny that the said board of directors on the 16th day of January, or at any time, passed any resolution to the effect that the said Silver Bell Copper Company should deliver or cause to be delivered to the said Steinfeld any promissory note belonging to said corporation, or to the effect that the said Steinfeld should retain as his own the sum of \$25,750.00, being one-half of the sum of \$51,500.00 in his hands belonging to the said Silver Bell Copper Company, or any sum whatever. The defendants deny that the said Steinfeld before the commencement of this action received the said sum of \$145,743.75 and the said notes or either of them, or the said sum of \$103,967.00, the proceeds of said note, or the sum of \$25,750 as his own property and not as the property of any other person, firm or corporation, thereby converting said sum to his individual use or benefit, and not to the use or benefit of any other person, firm or corporation; and alleges that the said sum of \$145,743.75 and the said promissory note and the proceeds of the said promissory note were received by the said Steinfeld as belonging to himself, and the defendant the Mammoth Copper Company as being one-half the purchase price of the group of mines sold to the Imperial Copper Company, and as being a proportion thereof recognized by the board of directors of the company to rightfully belong to the said Mammoth Copper Company, and to the said

Steinfeld as owners of the mines which were sold to the Imperial Copper Company, and which did not belong to said Silver Bell Copper Company, and that the said money and note paid to the said Steinfeld was paid by authority of the said Mammoth Copper Company, and as its agent, and was received by him in pursuance of such authority and as such agent." [Transcript of Record, pages 290-1, folios 692-5.]

The issue raised was plainly the ownership and title to the said sum of \$145,743.75 and \$25,750.00 and the said note for \$100,000.00.

This Honorable Court in rendering its decision, recited the main facts in the case and in plain language specifically found that the action of the directors in holding that any resolution was rescinded other than the one giving Steinfeld the physical possession of the company's money and notes was wrong. The said court in equally specific language held that Steinfeld's claims to the 300 shares of stock, and to half the proceeds of the sales of the mines, were extinguished, and fixed the title to all of the said property in the Silver Bell Copper Company.

Zeckendorf v. Steinfeld, 225 U. S. 445,
Law Ed. 56, p. 1156, *supra*.

A consideration of the pleadings and findings in the case, however, led the lower court to credit Steinfeld with the sum of \$18,117 out of the said sum of \$145,743.75, leaving that amount \$127,626.75. And that amount plus in-

terest is the amount for which the lower court gave judgment against Albert Steinfeld in paragraph "SECOND" of the judgment herein appealed from. [Transcript of Record, pages 97-8, folios 227-8.]

The lower court in paragraph "THREE" gave judgment against Albert Steinfeld for the value of the \$100,000 note and interest [Transcript of Record, page 98, folio 228], which is undoubtedly, as just argued, what this court intended should be done.

Now, giving special attention to the "FOURTH" paragraph of the judgment, the complaint alleges the wrongful detention and appropriation of the \$25,750, the answer denies these allegations, but it does not admit Steinfeld's possession of the money as the property of the Silver Bell Copper Company, nor does it seek to justify Steinfeld's possession of it on the grounds that he held it under garnishment proceedings, nor does it tender an accounting or offer or ask for an accounting of this \$25,750. If the other side were permitted to refer to or discuss other evidence than the findings herein, we no doubt would have the right to point to that part of the evidence in this case which shows that the case in which the money was garnished was settled on July 8, 1905; that the answer in this case was filed January 6, 1908, and that, therefore, for more than two years and a half Stein-

feld had retained this money as his own and had not and could not allege, in his answer, or prove that he held it or any part of it under garnishment proceedings. For these reasons we feel justified in asserting that the lower court could not, in rendering the judgment and decree herein appealed from, enter a judgment or decree in respect to this \$25,750 that the pleadings of the defendant-appellant did not show he was entitled to, and that he did not even pray for.

That the \$25,750.00 really belonged to the Silver Bell Copper Company, and was retained by Albert Steinfeld is settled and determined by the findings. [Transcript of Record, page 368, see pages 392-3, folios 957-8.]

And judgment was necessarily given against Steinfeld therefor, but the lower court in its discretion gave to Steinfeld a right, which Steinfeld neither asked nor prayed for in his pleadings, viz., the right to recover from the Silver Bell Copper Company "all moneys legally and lawfully paid out by him by reason of a garnishment," etc., together with interest, computed in such way that the amount Steinfeld would be required to pay was the same as it would have been if an accounting had been prayed for in his answer and had been had on the trial of the action. To make Steinfeld's protection full and complete in the matter, the court stayed execu-

tion of that part of the judgment till the accounting was had.

The amount in dollars and cents of this "FOURTH" paragraph of the judgment will on accounting be the same if calculated according to this judgment, as it would, if, instead of a judgment, an order for an accounting had been made and had. But insofar as the pleadings in this case are concerned, the only issue made on the \$25,750 was as to its title and ownership. The complaint charged its conversion by Steinfeld, the answer denied the conversion, but did not set up any right to its possession, or explanation of Steinfeld's retention of it. The title was found to be in the Silver Bell Copper Company, but Steinfeld had its possession, judgment therefore properly went against Steinfeld for it, with interest. The findings of fact disclosed, however, that it had, at one time, while in Steinfeld's possession, been garnished, but whether it was still subject to the garnishment or not, was not disclosed by the findings. Under the general powers of a court of equity, Steinfeld was, as shown by the judgment, given the right to make an accounting, and was allowed interest upon the whole sum while it was in his hands subject to garnishment and was allowed interest from the dates of payment upon all sums rightfully paid out by him by reason of the garnishment. As Steinfeld had not pleaded

anything to entitle him to such accounting or interest, he has no right to complain, and as we make no complaint, we think justice was done.

The title to the \$25,750 was before this Honorable court when it considered Steinfeld's claim to one-half the proceeds of the sale to the Imperial Copper Company, and that title was, as hereinabove pointed out, decided against Steinfeld, and the question is not now open to review.

"FIFTH."

The sum of \$33,000 was the amount sued for in the second cause of action; it was the amount of a dividend paid Steinfeld on the 300 shares of stock. At the trial in the year 1908 it appeared that Steinfeld had paid out \$12,150 in acquiring the title to the said 300 shares of stock. The court allowed him credit for that amount, and rendered its judgment against Steinfeld on this item of the judgment for the difference, viz., \$20,850, with interest from January 20, 1904. [Transcript of Record, page 345, folio 839.]

This judgment on appeal was affirmed by the Supreme Court of the territory and by this Honorable Court. The total of this principal plus interest at 6% from January 20, 1904, to July 30, 1908, was \$26,514.25.

As our practice does not contemplate or provide for two final judgments in one suit or proceeding, and as the judgment of this Honorable Court affirmed in part and reversed in part the judgment originally entered on July 30th, 1908, by the lower court, it was necessary that a new judgment be entered not only upon the questions for which the case was reversed by this court, but also containing and reiterating that part of the original judgment which has been affirmed by this Honorable Court. Therefore, paragraph "FIFTH" of the judgment, from which this appeal is taken, was made a part of the judgment, so that in one judgment, that which was affirmed by this court was consolidated with that which the opinion of this court required to be done in reforming the judgment of July 30th, 1908. In entering judgment it should be for the aggregate amount of principal and interest.

Ency. of Pleading & P., Vol. 11, p. 971,
note 2.

The fact that the judgment provides for interest on this aggregate amount, thus making compound interest, is no objection.

Ency. of Pleading & P., Vol. 11, p. 971;
Cyc. Vol. 22, p. 1568, and authorities
cited;

Cole's Admr. v. Kelsey, 13 Tex. 75.

For other reasons this court cannot consider, for the purpose of modifying or changing the same, the said paragraph "FIFTH" of the said judgment. The reasons are as follows:

That part of this judgment as affirmed by this Honorable Court was entered not only as against Albert Steinfeld, appellant, but also as against Steinfeld's bondsmen on appeal, viz., Epes Randolph, Leo Goldschmidt, George Pusch and Fred Fleischman, as is shown by reference to said paragraph "FIFTH." Neither the said Randolph, Goldschmidt, Pusch or Fleischman appealed to the Supreme Court of the state of Arizona from this judgment nor from the Supreme Court of the state of Arizona to this court on said judgment. [Transcript of Record, p. 99, folios 230-1; pp. 165-8, folios 386-93; pp. 192, folio 446.]

"The sureties should be joined with the principal in a writ of error or an appeal sued out to the judgment entered against both the principal and surety. And the non-joinder of the sureties is ground for dismissing the writ of error;" unless under section 1005 Revised Statutes of the United States the court grants the right of amendment.

Encyc. of U. S. Sup. Ct. Rep., Vol. 2, pp. 65-6, and authorities cited.

This condition is aggravated in this case because a notice of appeal and an appeal bond

are both necessary parts of the procedure to give the Supreme Court of the state of Arizona jurisdiction. Revised Statutes of Arizona, 1901, par. 1496, p. 463. Revised Statutes of Arizona for 1913, pp. 503-4, par. 1234 to 1237. As shown by the foregoing references to the transcript of record, no notice of appeal nor appeal bond was given by Epes Randolph, Leo Goldschmidt, George Pusch or Fred Fleischman, and their time for giving such notice has long since expired.

“SIXTH.”

This paragraph of the judgment was for costs upon the second cause of action, and as the judgment upon the second cause of action was expressly affirmed by this Honorable Court on the first appeal, it cannot now be attacked, and in fact, as hereinbefore shown, no appeal was taken from this part of the judgment.

“SEVENTH.”

This paragraph of the judgment was for costs on the appeal from the Supreme Court of the territory of Arizona to this Honorable Court. These costs were expressly awarded by this Honorable Court on the first appeal, and they therefore cannot be questioned on this appeal, and in fact no appeal was taken from this paragraph of the judgment.

“EIGHTH.”

This paragraph of the judgment was for attorneys' fees to Edwin A. Meserve and Frank H. Hereford, and were also included in the second cause of action which was affirmed by this Honorable Court. No appeal was taken therefrom in this proceeding.

“NINTH.”

This paragraph of the judgment relates to attorneys' fees allowed by the lower court for services in the matter of the first cause of action. The complaint alleges the employment of the said Meserve and Hereford in this matter and the necessity therefor. [Transcript of Record, page 264, folio 619.] The answer makes no direct denial in this respect, though inferentially it raises an issue on the question. [Transcript of Record, page 273, folio 644.]

The lower court and the Supreme Court of the state of Arizona, in the record which came to this court upon the first appeal, expressly found in favor of the plaintiff upon this question of the employment of attorneys, and also found: “that 10% of the amount for which judgment is finally given in this action, is and will be a reasonable amount to be allowed plaintiff as a charge against said Silver Bell Copper Company as attorneys' fees for bringing and prose-

cuting this action for its benefit." [Transcript of Record, page 343, folios 833-4.]

As these findings were before this Honorable Court on the first appeal, and as they were neither disapproved of, modified or changed in any way, they were binding upon the Superior Court of Pima county and upon the Supreme Court of the state of Arizona. No question is raised as to the computation of this 10% for attorneys' fees, and the judgment in this respect could not be anything other than it was. Under any circumstances this judgment was perfectly consistent with the opinion of this court and with its action in affirming the item of attorneys' fees in the second cause of action. This judgment was rendered by a state court. No federal question is involved, and there is no appeal to this court.

In addition, all authorities sustain the allowance of attorneys' fees and other necessary disbursements in matters of this kind.

Cook on Corporations, Vol. III, p. 2089
(4th Ed.);

Cook on Stock and Stockholders, p. 979,
paragraphs 748-9;

Trustees v. Greenough, 10 U. S. 527,
Law Ed. 26, pp. 1157-62;

Meaker etc. v. Winthrop Iron Co., 17
Fed., p. 48, Fed Stats. Anno., Vol. 7,
p. 226;

Stringfellow v. King, 98 U. S., p. 610,
Law Ed. 25, p. 421;
Zeckendorf v. Steinfeld (Ariz.), 100 Pac.
784.

"TENTH."

This paragraph of the judgment related to other expenses of Louis Zeckendorf in the prosecution of this suit. It was in issue in the same paragraph of the complaint and answer as the attorneys' fees treated of in our discussion of paragraph "NINTH" and the same finding referred to in paragraph "NINTH" found in favor of the allowance of such expenses to the plaintiff. It was not appealed from, as heretofore shown, and is not only a proper part of the judgment but is apparently so conceded.

"ELEVENTH."

This paragraph of the judgment authorizes the payment to Albert Steinfeld of sums necessarily expended by him upon a proper accounting and further order of the court. Appellants neither complain of it nor appeal from it, and as if anything it was a judgment in their favor, and appellee does not complain, there can be no question about its being correctly a part of the judgment.

“TWELFTH.”

This paragraph relates to the dissolution, payment of corporation's debts and the distribution of its assets amongst its stockholders. This is expressly authorized by the decree of this Honorable Court on the first appeal. It is not appealed from by the appellants herein, though it was raised as an issue in the case and the finding was entered to the effect that it was necessary. The inclusion therefore of it in the judgment cannot be questioned.

This concludes our separate discussion of the different parts of the judgment rendered by the Superior Court of Pima county, state of Arizona. We wish to supplement our argument upon the judgment generally by discussing the question of interest.

Interest is allowable, as a matter of law, in cases where money has been unlawfully detained.

Young v. Godbe, 82 U. S. 566, Law Ed., Vol. 21, p. 250;

Crawford v. Milling, 4 Dal. U. S. 286, Law Ed., Vol. 11, p. 836;

Lincoln v. Claflin, 74 U. S., pp. 132-9, Law Ed., Vol. 19, pp. 106-9;

Spalding v. Mason, 161 U. S. 375, Law Ed., Vol. 40, p. 738;

U. S. v. State of North Carolina, 136 U. S., p. 211, Law Ed., Vol. 34, p. 336;

Holden v. Freeman's S. & T. Co., 100
U. S., p. 75, Law Ed., Vol. 25, p. 567;
Stewart v. Barnes, 153 U. S., pp. 455-65,
Law Ed., Vol. 38, pp. 781-5.
Cyc., Vol. 22, pp. 1495 and 1505-6.

When attorneys' fees are included in a judgment they bear interest at the same rate as the principal sum.

Cyc., Vol. 22, p. 1521.

As this Honorable Court on the first appeal especially decided that the money claimed by Louis Zeckendorf on behalf of the Silver Bell Copper Company, and referred to in the first cause of action, was unlawfully obtained and retained by Albert Steinfeld, we asked, and the Superior Court of Pima county granted, interest upon the sums unlawfully obtained, at the rate fixed by the laws of the state of Arizona for interest in such matters.

Revised Statutes of Arizona, 1901, par.
2774, p. 736;

Revised Statutes of Arizona for 1913,
p. 1219, par. 3505.

Appellees ask for 10% damages on the grounds that this is a frivolous appeal. Under the rules of this court 10% damages may be allowed as a penalty against any one taking a frivolous appeal. We claim that the appeal of

appellants in this case is frivolous; that there could be no mistaking or misunderstanding just what was decided by this Honorable Court on the first appeal; that the judgment rendered by the Superior Court of Pima county acting for this Honorable Court was in accordance with and in strict conformity to the said decree of this Honorable Court; that the rules and decisions of this court have been too long and too firmly established to justify any attempt to have them set aside or modified in this particular case; that there were no reasons for questioning or appealing from the judgment and decree of the Superior Court based upon any ruling or decision of this Honorable Court or of the Supreme Court of the state of Arizona, and that the appeal is frivolous and prosecuted solely for the purpose of delaying the enforcement of the judgment authorized by this Honorable Court in June, 1912. For the foregoing reasons we ask that an order be entered affirming and dismissing the appeal in this case, with 10% damages against appellant Albert Steinfeld, who alone was affected by the judgment from which this appeal is taken.

Respectfully submitted,

EDWIN A. MESERVE and

FRANK H. HEREFORD,

Attorneys for Appellee Louis Zeckendorf.



IN THE
SUPREME COURT OF THE UNITED STATES.
OCTOBER TERM, 1915.

No. 239.

ALBERT STEINFELD ET AL., PLAINTIFFS IN ERROR,

vs.

LOUIS ZECKENDORF AND HIRAM W. FENNER,
RECEIVER, DEFENDANTS IN ERROR.

MOTIONS TO DISMISS WRIT OF ERROR.

Now comes Louis Zeckendorf, one of the defendants in error, and moves this honorable court to dismiss the writ of error herein or to dismiss and affirm the judgment with 10 per cent damages as a penalty for a frivolous suing out of said writ. This motion is made upon the following grounds:

First. This is a writ of error from the action of the Supreme Court of the State of Arizona dismissing an appeal to it from the Superior Court of the County of Pima, State of Arizona. No Federal or other question is involved for which an appeal or writ of error to this honorable court from a State court is provided by law.

Second. That this case was on appeal to this honorable court, once heard, determined on the merits, and remanded for further proceedings not inconsistent with this court's

opinion; that the judgment and decree from which this writ of error is taken is not inconsistent with this court's opinion on the first appeal and was and is in conformity thereto; that therefore no ground for this writ of error exists. That this writ of error is frivolous and taken for delay only, and this defendant in error asks that the penalty of 10 per cent damages for a frivolous appeal or writ of error be imposed upon plaintiffs in error.

Third. This defendant in error further moves this honorable court specially as follows, to wit:

(a) That the writ of error, in so far as it is prosecuted by R. K. Shelton, J. N. Curtis, and the Mammoth Copper Company against defendants in error, be dismissed, for the reason that the record in this case shows that no judgment or decree of any kind or character was rendered against them or either of them, and they were not nor was either of them injuriously affected in any way by the judgment complained of.

(b) Moves to dismiss this writ of error in so far as it purports to have been sued out by the Silver Bell Copper Company, a corporation, for the reason that it appears by the petition for the writ of error herein and by the transcript of the record in this case that Hiram W. Fenner was regularly appointed a receiver of said Silver Bell Copper Company and all of its business, property and assets; that he qualified as such, and that he had been regularly substituted as a party to this action in the place and stead of the said Silver Bell Copper Company, and that said Silver Bell Copper Company is no longer a party to this action or cause.

(c) Moves to dismiss the writ of error in so far as it affects the judgment of the Supreme Court of the State of Arizona in relation to and bearing upon all matters involved in the second cause of action, for the reason that no appeal on the

writ of error was taken from the judgment rendered upon the second cause of action by either Epes Randolph, Leo Goldschmidt, George Pusch, or Fred Fleishman, the sureties against whom also the judgment runs as appears from the transcript of the record in this case.

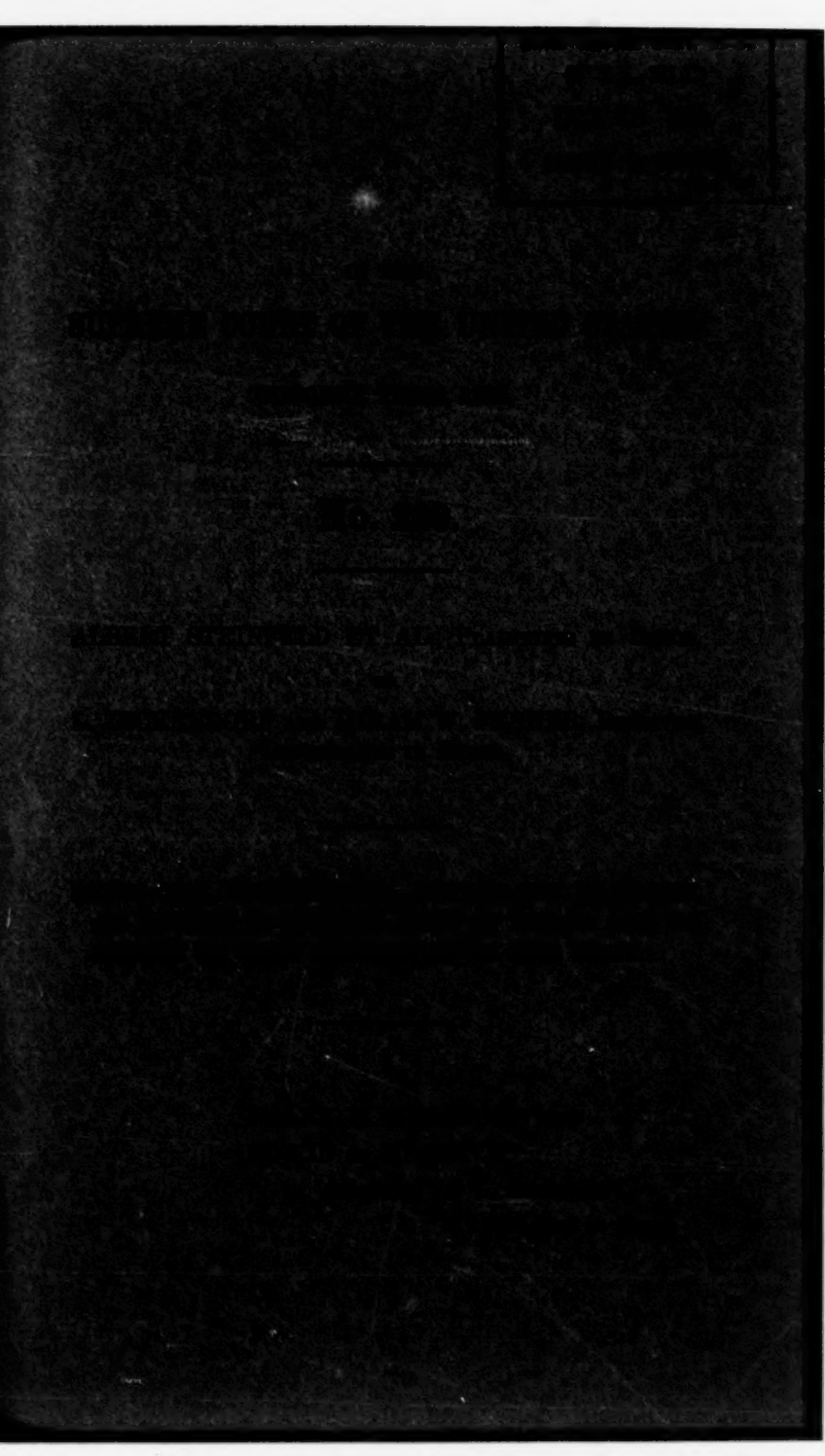
(d) Moves to dismiss the said writ of error in so far as the judgment from which the said writ of error was taken bears upon or relates to the subject of attorney's fees, for the reason that the said judgment for attorney's fees is a judgment against the Silver Bell Copper Company and is not a judgment against either Albert Steinfeld, R. K. Shelton, J. N. Curtis, or the Mammoth Copper Company; that the said Silver Bell Copper Company has not taken an appeal or writ of error to this honorable court from the said judgment in this case, as appears from the allegations of the petition for the writ of error filed in this case, in particular that a receiver of said company, as hereinabove recited, had been substituted as a party in this case in the place and stead of said Silver Bell Copper Company, and that said receiver did not join in said petition, and for the additional reason that it does not appear that either the said Albert Steinfeld, B. K. Shelton, J. N. Curtis, or the Mammoth Copper Company are affected by or are parties to the said judgments for attorney's fees against the said Silver Bell Copper Company.

Wherefore this defendant in error prays the judgment of this court in accordance with the above and foregoing motions, and if consistent with the rules and opinion of this honorable court that the judgment from which this writ of error is taken be affirmed, with 10 per cent damages as a penalty for the frivolous suing out of this writ.

Respectfully submitted,

EDWIN A. MESERVE,
FRANK H. HEREFORD,
Attorneys for Defendant in Error
Louis Zeckendorf.





IN THE
SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1915.

No. 239.

ALBERT STEINFELD ET AL., PLAINTIFFS IN ERROR,

vs.

L. ZECKENDORF AND HIRAM W. FENNER, RECEIVER,
DEFENDANTS IN ERROR.

**BRIEF OF L. ZECKENDORF, DEFENDANT IN ERROR,
ON MOTION TO DISMISS WRIT OF ERROR AND ON
MERITS OF CASE PRESENTED BY THE WRIT.**

Under the stipulation of counsel and the orders of this court there are now before this court in this case the briefs on file in case No. 239 of this October, 1915, term. On behalf of the defendants in error and appellees there have been filed the following briefs in that case, which are to be read and considered by this honorable court in deciding this case, viz:

1. Brief of L. Zeckendorf, appellee, on motion to dismiss.
2. Brief of Hiram W. Fenner, receiver, appellee.
3. Brief of L. Zeckendorf, appellee, on merits.

The Zeckendorf brief on the motion to dismiss of necessity goes somewhat into the case on its merits, and in particular deals somewhat at length with the questions presented as to the claimed errors in regard to the \$27,500 paid Francis & Volkert by Steinfeld and the \$25,700 garnisheed in the Franklin case. Accepting these briefs as arguments presented in this case, as well as in that appeal, we will refrain from further reference thereto and will here add only such suggestions in addition to those there made as we deem to the interest of the cause of the appellees or defendants in error.

Motion to Dismiss the Writ.

We have presented and filed, under the stipulation of counsel and the order of this court, a motion to dismiss the writ of error and will also present and file this brief.

The first and second grounds of the motion to dismiss the writ of error are the same in effect and present the same questions as the motion to dismiss the appeal in case No. 239, and these are sufficiently argued in the aforementioned briefs on file in that case.

The grounds stated in the third paragraph of the motion to dismiss the writ of error, while generally argued in the former briefs, have not been argued specially, particularly in connection with any motion to dismiss or to dismiss and affirm. This ground "third" is divided into four parts, designated, respectively, *a*, *b*, *c*, and *d*.

Considering these in their order, we take up subdivision A, which in effect is that plaintiffs in error R. K. Shelton, J. N. Curtis, and the Mammoth Copper Company were in no way injuriously affected by the judgment complained of.

That judgment was against Albert Steinfeld and certain of his sureties in part and against the Silver Bell Copper Company in part. It decreed nothing against Shelton, Curtis, or the Mammoth Copper Company; neither did it command them to do anything. It is clear that not being affected by the judgment or decree they have no appealable interest.

B. The point here made is that the Silver Bell Copper Company could not sue out a writ of error in this case by any attorney or other agent, because of and for the reason that, first, it was in the hands of a receiver, and, second, that it was no longer a party to the cause, for the reason that the receiver had in fact been substituted for it, and had sole power to act in its interests. The receiver is in fact made an appellee in case No. 239 and a defendant in error in this case. To argue that the Silver Bell Copper Company could sue out a writ of error in this cause against its receiver as defendant in error is to argue that that company can sue out a writ against itself; and to argue that it can as an appellant take an appeal is to argue that it can as an appellant take an appeal as against itself as appellee. The petition for the writ of error, and on which the writ was granted and issued, expressly alleges that the Silver Bell Copper Company was in the hands of a receiver; that a receiver had been regularly appointed and qualified and had been in fact substituted as a party in the action in the place and stead of the corporation; and that the receiver had not joined in the petition for the writ of error. Clearly, therefore, there is no attack by the Silver Bell Copper Company against that part of the judgment rendered against it; and Steinfeld and the other plaintiffs in error (appellees in case No. 239) have no right to sue out a writ of error attacking that part of the judgment which is not against them, but is against the Silver Bell Copper Company alone. We think that the bare statement of this matter argues itself, but it is also fairly well covered in our other briefs.

C. This ground of motion to dismiss is addressed to the appeal and the writ of error from the judgment on the second cause of action. This was a joint judgment rendered against Albert Steinfeld and his bondsmen on appeal, viz., Epes Randolph *vs.* Leo Goldsmidt, George Pusch, and Fred Fleischman, none of the bondsmen having at any stage of the action since the rendition of the judgment taken any steps whatsoever by way of appeal or writ of error, leaving the judgment in any and all events to stand as against them. This matter is presented on pages 38 and 39 of our brief on the motion to dismiss the appeal, and counsel have not attempted to meet the suggestion in their reply brief, in fact, therein did not even mention the question. The item affected by this part of our motion is the sum of \$1,670 designated by counsel in their assignment of errors as "compound interest on second cause of action." We have heretofore fully argued the merits of this claim and shown that it was a proper part of the judgment. The point here made is that the question is not even subject to review in this court in any proceeding.

D. The question of attorneys' fees. In the briefs on file we have argued the merits of this question as though it were properly a matter of review by this court. We have also shown why this court cannot review that part of the judgment for attorneys' fees, because that part of the judgment is against the Silver Bell Copper Company and not against any other defendant; in other words, does not affect any plaintiff in error or appellant, and, as before stated, the Silver Bell Copper Company has in legal effect not appealed or sued out a writ of error. We might add to what we have already said on this subject, that a corporation can only act by its duly authorized agents, and if it be shown that any act purported to have been taken in its name was in fact taken by an agent not authorized or who was acting beyond his powers, then in fact and in law the corporation has not acted.

This covers the motion to dismiss the writ of error in appeal case No. 239.

The Merits of the Case Presented by the Writ of Error.

The points made by plaintiffs in error in their assignments of error accompanying their petition for the writ succinctly stated are as follows, viz:

A. The lower court erred in not granting them a new trial. This point has been fully covered in the several briefs on behalf of the appellees in case No. 239, and we will not attempt further discussion of that point in this brief.

B. The allegation in said assignments of errors that the court erred in rendering judgment against Steinfeld for the "amount paid to Francis & Volkert, \$12,700, interest thereon, \$7,201.75"; total, \$19,901.75. This matter has been argued at some length in our brief on the motion to dismiss the appeal and also on the merits of the appeal in case No. 239; but we desire to add to what we there said the following: Neither the said sum of \$12,700 nor the interest thereon has, up to this date, been an issue in this case. This defendant in error, L. Zeckendorf, could not, even had there been pleadings raising an issue regarding it or for an accounting concerning it, have litigated it. The question of whether or not Steinfeld is entitled to any credit because of this payment to Francis & Volkert was and is a question between Steinfeld and the Silver Bell Copper Company. Zeckendorf, as a stockholder of the Silver Bell Copper Company, was by this action seeking to compel Steinfeld to refund and pay back to that corporation certain designated moneys and notes (or the proceeds thereof) wrongfully misappropriated by Steinfeld from that corporation. If Steinfeld had any debts or claimed credits against that corporation for money paid out in its behalf it was his duty, at the proper time and in the legal way, to present his claim therefor. As we have heretofore, in our other brief, pointed out, the court by its judgment, on the initiative of Zeckendorf, provided in para-

graph eleventh thereof for Steinfeld to present an account for all credits he may claim to have against the Silver Bell Copper Company, with the provision that, if allowed, audited, and approved by the court, the receiver shall pay the same. The sole question in this case before the several courts, including this honorable court, on the former appeal was as to who owned and was entitled to the possession of \$145,753.75, a promissory note of the par value of \$100,000, the sum of \$25,750 involved in the Franklin garnishment, and the \$33,300 dividend on 300 shares of stock, and the appointment of a receiver of and the dissolution of the corporation. This honorable court affirmed the judgment appointing the receiver and dissolving the corporation and decided that said specified sums of money and said note were the property of the Silver Bell Copper Company, and that Steinfeld had wrongfully taken the same from the corporation. No other question was before this honorable court nor decided by it. No accounting had been asked for, Steinfeld had made no claim for credit on account of this payment; it is and was not involved in the pleadings or issues of the case. Therefore, the lower court could not deduct that amount from the amount which this court had decided belonged to the Silver Bell Copper Company, at least until Steinfeld had made a formal application for such a credit, which has never yet been done. The lower court by its judgment did grant Steinfeld the right to come in and ask for such a credit. He is now attempting to distort that gratuitously granted or extended privilege of the court in his favor into a claim of wrong. Whenever Mr. Steinfeld sees fit to pay the judgment against him and then to present his account against the Silver Bell Copper Company for any claims which he may care to assert and present, and if any part of such claims are disallowed, then and not until then will he have any right of complaint or of appeal or writ of error. Until this account has been disallowed, in whole or in part, he will not have been injured.

C. "Franklin garnishment, \$25,750, and interest thereon, \$14,613.11; total, \$40,363.11." Everything we have said concerning the Francis and Volkert matter applies to this matter. We have also discussed this matter at length in the other briefs.

D. "Ten per cent for attorneys' fees on all the foregoing items, \$6,026.48; other additional attorneys' fees, \$33,098.65." There is no judgment for attorneys' fees in these amounts. The judgment for attorneys' fees is in the sum of \$2,652.50 on the second cause of action and \$40,135.13 on the first cause of action, and is against the Silver Bell Copper Company and not against Steinfeld, Curtis, Shelton, or the Mammoth Copper Company. We have hereinbefore argued that the Silver Bell Copper Company has not questioned this judgment and that none of the other named plaintiffs in error have the legal right so to do. We have in our other briefs shown this honorable court that the fees allowed were proper in amount, were properly allowed, and that they were in strict accordance with and could have been for no less an amount under the findings and decision of this court. We also desire to call this honorable court's attention to our former arguments, to the effect that, being a new question arising since Arizona became a State and not inconsistent with the decision of this court, it cannot now be reviewed by this honorable court. We also desire to call to this honorable court's attention the fact that the findings fixed the amount at 10 per cent of the judgment, neither more nor less; that neither this court nor the lower court has or had power to change those findings; and this court must therefore approve the judgment or decide that Mr. Zeckendorf cannot recover any fees for the services of his attorneys in recovering for the corporation this large collectible judgment.

E. "Compound interest on second cause of action, \$1,670." This is not compound interest, as we have shown in our for-

mer briefs, but is interest on a definite fixed amount of the judgment, which, under the statute of Arizona heretofore quoted by us in full, bore interest to that amount. We also call attention to the provisions of subdivision 1 of rule 23 of this honorable court. (See Printed Rules, pages 28 and 29.) We have also hereinabove shown why this court cannot review this item, because the judgment therefor was jointly against Steinfeld and parties not before this court.

We feel more than justified in saying at the close of this brief that the more the contentions of counsel are analyzed the more certain must it appear that all these appeals and this writ of error are for delay, in order that Albert Steinfeld may continue to use the vast sum of money involved herein, with a charge for that use of but 6 per cent per annum, simple interest, not payable annually, but when execution issues.

Respectfully submitted,

FRANK H. HEREFORD AND
EDWIN A. MESERVE,

*Attorneys for L. Zeckendorf,
Defendant in Error.*



STEINFELD *v.* ZECKENDORF.APPEAL FROM AND ERROR TO THE SUPREME COURT OF THE
STATE OF ARIZONA.

No. 239. Argued October 19, 20, 1915.—Decided November 1, 1915.

A court is not precluded from construing a document because its construction is affected by facts and circumstances not open to dispute. Whatever may be the rule as to legislatures and statutes this court may determine from the knowledge of its members whether the court below has acted as this court intended it should upon a mandate recently entered.

Cases come to this court from Arizona in the usual form, and this court has no jurisdiction on appeal from a judgment of the Supreme Court of that State even though entered on the mandate of this court in a case originally coming here from the Supreme Court of the Territory of Arizona.

As the judgment entered by the Supreme Court of the State in this case is not inconsistent with the opinion of this court there is no reason for disturbing it.

This court will not consider provisions in a judgment of the state court entered on the mandate of this court as to matters non-federal.

15 Arizona, 335, affirmed.

THE facts, which involve the jurisdiction of this court on appeals from and writs of error to the state court and the construction of the mandate of this court and the power and duty of the Supreme Court to act thereon, are stated in the opinion.

Mr. James M. Beck and *Mr. Francis J. Heney*, with whom *Mr. Eugene S. Ives* was on the brief, for plaintiff in error:

The jurisdiction of this court on the former appeal was limited to the single question of law, do the findings of fact support the judgment? And consequently that was the subject-matter of the proceeding here. *Zeckendorf v.*

239 U. S.

Argument for Plaintiff in Error.

Steinfeld, 225 U. S. 445; *Eagle Mining Co. v. Hamilton*, 218 U. S. 513; *Idaho Land Co. v. Bradford*, 132 U. S. 513.

This court in the exercise of such appellate jurisdiction cannot and will not supply, by intendment or inference, any missing material fact, even if there were sufficient evidence or sufficient probative facts in the findings, from which the lower court might have inferred such missing material fact. *Sun Ins. Co. v. Ocean Ins. Co.*, 107 U. S. 485; *Burr v. Des Moines Co.*, 68 U. S. 99; *Hecht v. Boughton*, 105 U. S. 235; *Lincoln v. French*, 105 U. S. 614; *Dower v. Richards*, 151 U. S. 659; *Wilson v. Merchants' Trust Co.*, 183 U. S. 121; *Raimond v. Terrebonne Parish*, 132 U. S. 192; *Lehnen v. Dickson*, 148 U. S. 71; *Barnes v. Williams*, 11 Wheat. 414; *Powers v. United States*, 119 Fed. Rep. 563; *The E. A. Packer*, 140 U. S. 360.

French v. Edwards, 21 Wall. 147, as construed in *French v. Edwards*, 91 U. S. 423, and *Ex Parte Medway*, 90 U. S. 504, are on all fours with the case at bar.

The mandates of this court are to be interpreted according to the subject-matter of the proceeding here, and, if possible, so as not to cause injustice. *Supervisors v. Kennicott*, 94 U. S. 449.

Steinfeld has never had his day in court on these questions of fact.

Whenever a trial court fails to find any material fact by reason of a wrong theory of the case adopted either by itself or an intermediate appellate court, the court of last resort, if it reverses the judgment, should direct or at least authorize a new trial to prevent injustice to appellee or defendant in error. *Edmonston v. McLoud*, 16 N. Y. 543; *Griffin v. Marquardt*, 17 N. Y. 28; *Ball v. Rankin*, 101 Pac. Rep. 1105.

When an appellate court, on the evidence as it is presented in the record, or on findings of fact which are conclusive upon it reverses, generally, the judgment of the

lower court, an appellee or defendant in error is entitled as a matter of right to a retrial of the case, and the mandate of this court should be interpreted accordingly. *Lincoln v. French*, 105 U. S. 614; *Elliott's App. Pro.*, § 580; *Talcott v. Delta Land Co.*, 73 Pac. Rep. 256; *Faulkner v. Healy*, 107 California, 49; *Stearns v. Aguirre*, 7 California, 443; *Prentice v. Crane*, 88 N. E. Rep. 655; *Ryan v. Tomlinson*, 39 California, 639.

Should the court, however, conclude that its opinion and decision on the former appeal must be interpreted as in effect an instruction to the trial court to enter judgment against Steinfeld on the first cause of action, then, nevertheless, that judgment is erroneous, and is too large by \$101,059.99. *In re Washington*, 140 U. S. 92; *Himely v. Rose*, 5 Cranch, 312; *McMannomy v. Chi. D. & V. R. Co.*, 47 N. E. Rep. 713.

Mr. Frank H. Hereford, Mr. Edwin A. Meserve and Mr. Selim M. Franklin, with whom *Mr. Edwin F. Jones* was on the brief, for defendant in error.

MR. JUSTICE HOLMES delivered the opinion of the court.

This case first came here by appeal from the Supreme Court of Arizona while Arizona was still a territory. Before the decision by this court Arizona became a State, and the judgment, so far as now in controversy, having been reversed, the case was remanded "for such further proceedings as may not be inconsistent with the opinion of this Court," the formula usual in cases coming from a State. 225 U. S. 445, 459. The ground for the present attempt to reopen the merits is that the state court has misinterpreted the mandate that it received. *Martin v. Hunter*, 1 Wheat. 304, 354. See *Julian v. Central Trust Co.*, 193 U. S. 93.

The case is stated at length in the former decision. All

239 U. S.

Opinion of the Court.

that is necessary to explain the present question may be put in shorter form. The suit was brought by Zeckendorf as a stockholder in the Silver Bell Mining Company to recover money alleged to belong to the Company and appropriated by Steinfeld. There was a further cause of action alleged but that has been disposed of. The money represents the proceeds of the Silver Bell mine and a group of mines adjoining the Silver Bell and purchased by Steinfeld, it was assumed by the parties, as trustee for the company. Steinfeld sold all the mines for \$515,000, \$115,000 cash, \$400,000 in notes for \$100,000 each, and his action was confirmed. At the time of the conveyance to the purchaser it was agreed by a contract in writing that the purchase price should belong to the Silver Bell Copper Company, and in the same instrument it was provided that the four notes should be held by Steinfeld as trustee and as security against his personal obligations in the matter. Steinfeld received the cash and the proceeds of the first two notes, paid certain liabilities of the company and deposited the residue, except \$50,000 attached in his hands, in the Bank of California in his own name.

In December, 1903, Zeckendorf brought a suit to restrain the turning over of the deposited funds by the bank to Steinfeld, and on December 26, 1903, a stockholders' meeting was held at which all parties were represented and a vote of rescission was passed upon which the present question arises. For Steinfeld it is argued that the whole agreement was rescinded. The other side contends that the rescission went only to the clause giving Steinfeld a right to the personal custody of the money. The directors, consisting of Steinfeld and his creatures, although not understanding the rescission to go beyond the indemnity clause, passed a vote behind Zeckendorf's back under which the proceeds of the sale were divided and one-half given to Steinfeld. After the judgment of this court the state court conceived itself bound by the mandate to

enter judgment for the plaintiff and did so. It now is contended on Steinfeld's part that he never has had his day in court to present his case; for, it is said, the territorial court simply ruled as matter of law that the vote of rescission rescinded the contract *in toto*, and this court, if it thought, as it did that the ruling was wrong, properly could do no more than to send the case back for a finding of fact as to the true purport of the vote. If this should be done Steinfeld alleges that he has evidence that he wishes to present.

A court is not necessarily precluded from construing a document because the construction is affected by facts and circumstances not open to dispute. But the question now is not whether this court was right or wrong, but what it did. The mandate issued within the memory of present members of the court, and there is no doubt that the court below did what we intended that it should. In the time of Edward I., Hengham interrupted discussion of the Stat. Westm. II. by saying 'We know it better than you, for we made it.' *Ne glosez point le Statut; nous le savoms meuz de vous, qar nous les feimes.* Y. B. 33 Ed. I. Mich., Rolls Ed., 83. However it may be as to a statute, the objection seems reasonable when applied to a mandate that has been followed as it was meant and the following words among others show clearly enough that we expressed our intent: "In our view, the facts found show that . . . the subsequent attempt to rescind the action by which the proceeds of the sale of the English group of mines became the property of the Silver Bell Company and to give the proceeds to Steinfeld must be held for naught." 225 U. S. 450. If the Territory had not become a State a judgment would have been ordered. The more reserved phrase was used by reason of the change, but with no change in what consistency with our opinion was deemed to require.

We see no reason for supposing that cases were intended

239 U. S.

Statement of the Case.

to come to this court from Arizona in other than the usual form. Therefore in any event this appeal would have to be dismissed. To meet this possibility a writ of error was allowed at the last moment. We have considered the record as if made up under the writ. But apart from technical objections that have been urged the only question that would be open is whether the judgment below was inconsistent with the opinion of this court, and as it very plainly is not, there is no reason for disturbing it. Our mandate was not concerned with the allowance of attorneys' fees and some other matters that were argued, and therefore they present no Federal question and need not be considered.

Appeal dismissed.
Judgment affirmed.